No. 972

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In the
Supreme Court of the United States
OCTOBER TERM, 1940

ALBERT ROBERTS, JR.,
Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Brief in Support Thereof

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In the
Supreme Court of the United States
OCTOBER TERM, 1940

No.....

ALBERT ROBERTS, JR.,
Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,
Respondent.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

Petitioner, Albert Roberts, Jr., seeks a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, to review its judgment rendered February 19th, 1941 (R 423-B), 117 Fed. (2d) 943, re-hearing denied March 20th, 1941, affirming a decree of the United States District Court for the Southern District of Florida, confirming a plan of composition filed under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403).

II.

Jurisdiction of this court is asserted under the judicial code, Sections 240 and 262, as amended, U. S. C. A. Title 28, Sections 347 and 377; Chapter IV (Section 24 C) Bankruptcy Law, as amended (Chandler Act) U. S. C. A. Title 11, Section 47 and Rule 37, of this court.

239 U. S. 11, Central Trust vs. Lueders.

191 U. S. 115, Holden vs. Stratton.

III.

Summary and Brief Statement

NOTE: The complete record is comprised of two sections, Nos. 9381 and 9596. In referring herein to the records, the proceedings under No. 9381 will be designated "A" (thus 15-A) and those under No. 9596 as "B" (thus R 15-B). (All emphasis ours, except where otherwise designated.)

On June 16, 1939, the Board of Public Instruction of Broward County, Florida, filed a petition in the United States District Court under the provisions of Chapter IX of the Bankruptcy Act (11 U. S. C. A. 401-403) for approval of a plan of composition of certain of its debts (R 1/11-A). On May 2, 1939, prior to any proceeding in court, the board contracted with one, Ralph Horton, to act as its "Refunding Agent" (R 149-B et seq.). The Agent was to have complete charge of the refunding, was to furnish the attorneys for the Board in carrying the proceedings through, was to pay the fees and costs for the validation of the refunding bonds, the approving attorneys opinion, and all costs incurred in formulating and carrying out the plan of composition (R 354-B). For these services, if the plan was con-

summated through bankruptcy proceedings, a fee to be *paid from* the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund" equal to twenty (20) per cent of the face value of the coupons and interest maturing before October 1, 1939. Refunding bonds were to be issued for the outstanding principal indebtedness, and the unpaid interest and interest coupons to October 1, 1939, were to be surrendered and wiped out. The fund to service the refunding bonds was to be paid solely from taxes levied under the authority of Article XII, Section Eight of the Constitution of Florida (R 19-A). This particular fund was divided into two separate components, one of which, the "B. P. I. Bond Fund", was comprised of taxes levied on property not exempt by the Homestead Amendment to the Constitution of Florida, (R 19-A), and another, the "B. P. I. Homestead Levy Fund", a fund payable solely from taxes levied on properties which were *exempt* from all taxation by Article X, Section Seven, of the Constitution of the State of Florida, (the so-called "Homestead Amendment" adopted November 6, 1934). The original bonds were issued prior to 1934, hence the refunding bonds carried the same pledge to levy taxes on properties exempt by the Homestead Amendment.

Petitioner filed his sworn proof of claim (R 62-63-B) showing that he was the owner of Twelve Thousand Five Hundred and Ten Dollars ($12,510.00) in face amount of coupons of one of the issues being composed in the proceedings (Board of Public Instruction Bonds, dated October 1, 1927). He filed his answer in due time, objecting that the plan would be unfair to him in that he would receive nothing for his claim of $12,-510.00. In the proceedings, the Board filed an objec-

tion to that part of Petitioner's claim in the face amount of $5,070.00, being the amount of coupons detached from Bond Nos. 66 to 78 incl. The objection to this part of the claim was grounded on the theory that a judgment had previously been rendered in favor of the Board in an action in which the bonds were used to evidence a claim (R 58-A) and that the judgment was res adjudicata of the invalidity of the bonds. Other bonds of same issue were recognized as valid. *No objection was at any time interposed by any person, including the Board, to the other part of Petitioner's claim in the face amount of $7,440.00, and the master specifically made a finding allowing the claim in that amount (R 241-B). The court in the interlocutory decree confirmed the master's allowance of the claim (R 394-B, R 263-B).*

In support of his objection to that part of Petitioner's claim in the face amount of $5,070.00 (coupons from bonds 66 to 78 incl. of the 10-1-27 issue) the attorney for the Board filed in evidence, over the objection of the then attorney for the Petitioner (R 85/87-B) a copy of the judgment and verdict in a case rendered on April 5, 1934, in the United States District Court for the Southern District of Florida, where one N. A. Turner, trustee, was plaintiff, and the Board was defendant. Specific objection was made to the introduction of the verdict and judgment without the whole file (R 85/87-B). The Turner suit was an action on the common counts—no action was ever instituted on the bonds or the coupons—the sole use made of the securities in that proceeding was to evidence the debt which the Board denied in that proceeding and now admits in this action. The District Judge (Ritter) in the Turner

action, directed a verdict for the defendant on the ground that the *debt* evidenced by the 10-1-27 issue of bonds was prohibited by the Constitution of Florida, and therefore there was not even an implied promise to repay the monies. The case was appealed to the Circuit Court of Appeals for the Fifth Circuit, which sustained the lower court on a point of procedure (75 F (2d) 147).*

The Petitioner did not produce further evidence to sustain his acquisition and ownership of the $7,440.00 face amount of coupons, other than his sworn proof of claim, after it had been allowed by the master (R 241-B), nor was there any occasion for him to do so because neither the Board nor any other person objected at any time during the proceedings to the allowance of the $7,440.00 claim; *and to the very end of the case, the claim stood as an allowed claim.* After the case was closed, the master filed his final report. He found (R 228/238-B) that the plan of composition was fair and equitable as a matter of law, even if it did discriminate against the Petitioner as the holder of interest coupons (R 236-B) alone. As to the $7,440.00 claim which *had been allowed* by the master and to which no objections had been interposed by any party, the master determined that the appellant had not explained the bona fides of his acquisition of such coupons and could not

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*The opinion reads as follows:

"Issue was joined in an action for money had and received, and the trial resulted in a directed verdict and judgment for the defendant. The plaintiff appeals on the theory that upon the evidence submitted, it was error for the trial court to direct a verdict against him. But the transcript of record contains no bill of exceptions, and so we are unable to determine what evidence the trial court acted upon or had before it. In this state of the record, the judgment must be affirmed."

object to the plan even if it did discriminate against him. The master further found that the Board was "authorized by law" to take all action necessary to be taken by it to carry out the plan (R 243-B) and recommended, as the plan provided, that the refunding agent be paid for his services and expenses the sum of Thirty-Five Thousand Three Hundred Sixty-Two Dollars and Ninety-Two Cents ($35,362.92). This fee and costs of the "Refunding Agent" was to be paid over a period of five years, from the two funds set up for the benefit of the bondholders, to wit—from the "B. P. I. Bond Fund" (a fund from taxes levied against all property in the county not exempt by the Homestead Amendment to the Florida Constitution) and the "B. P. I. Homestead Levy Fund" (a fund from taxes levied solely on properties exempt from all taxation by the so-called "Homestead Exemption" amendment to the Florida Constitution in 1934). The master's report was confirmed and on February 18, 1940, the interlocutory decree was entered by the court.

IV.

The Questions Presented

1.

In a composition proceeding under the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) where the master allows the sworn uncontradicted claim of a creditor (the court confirms the allowance of the claim in the interlocutory decree), and to which claim no objection was filed by any party and to the very end of the case the claim stood as an allowed claim, then after the case is closed and on the final report, the master determines that, notwithstanding the allowance of the

claim, the claimant, not having explained the bona fides of the acquisition of his claim, has no standing in court to object to the discrimination of the plan against him—was not this procedure such a departure from the usual and accepted course of judicial proceedings as to deny the creditor his property without due process of law?

2.

Is a Board of Public Instruction in the State of Florida "authorized by law" as required by 11 U. S. C. A. 403 (e) (6) to carry out a plan of composition which contains a "fiscal agency" contract, the cost of which is to be paid from funds set up for the bondholders, and from funds collected under authority of Article XII Section Eight of the Florida Constitution for the sole benefit of the public free schools, and from funds collected by taxing "Homestead exempt" properties (properties exempt from all taxation) when under the law of the State of Florida, as enunciated by the Supreme Court of Florida (a) the "fiscal agency" contract is illegal and void; (b) the assessment of the fiscal agents costs and fees from funds set up for the holders of refunding bonds is illegal and void; (c) funds collected under authority of Article XII Section Eight of the Constitution can never be diverted from the public free schools; and (d) the assessment of the costs of the "fiscal agency" contract against Homestead exempt property is contrary to the Constitution and law of the State of Florida.

3.

In a proceeding for a composition of debts under the provisions of the Municipal Bankruptcy Act (11 U. S. C. A. 401-403) is the Federal Court bound by the de-

cisions of the State Court holding that, in substantiating a plea of res adjudicata, the introduction in evidence of a judgment, without the complete record, is insufficient as a matter of law, or may the Federal Court make an independent determination of the point, contrary to the decisions of the court of last resort in the state in which the proceeding is being instituted?

V.

Reasons Suggesting the Necessity for the Writ of Certiorari

The following reasons indicate that the points involved in this case are of sufficient importance to justify the issuance of a Writ of Certiorari:

1.

The procedure followed in the trial of the case, sanctioned by the Circuit Court of Appeals, in which the master specifically allowed that part of the Petitioner's claim in the sum of Seven Thousand Four Hundred Forty Dollars ($7,440.00) (R 241-B) (the court in the decree confirmed the allowance by the master (R 394-B, R 263-B) and to which claim no objection was raised by the Petitioner or any other party, and to the very close of the case the claim stood as an allowed claim, and then after the case was closed the master in his final report, notwithstanding the fact that his claim had been allowed, determined that the Petitioner, not having produced evidence to establish the bona fides of the acquisition of his claim, could not complain of the discrimination of the plan against him, was such a departure from the usual and accepted judicial pro-

cedure as to deny the Petitioner his property without due process of law.

Sanders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163, 1165, 37 S.Ct. 638

Snyder v. Mass., 291 U.S. 128, 78 L.Ed. 689, 54 S.Ct. 330, 90 A.L.R. 575

Bandim Petroleum Co. v. Superior, 284 U.S. 8, 19, 76 L.Ed. 136, 144, 52 S.Ct. 103, 78 L.Ed. 826

Georgia R. & Electric Co. v. Decatur, 295 U.S. 165, 79 L.Ed. 1365, 1370, 55 S.Ct. 701

2.

The decision of the Circuit Court of Appeals is in conflict with the decisions of this court, Case v. Los Angeles Lumber Co., 308 U. S. 106; American United Life Insurance Co. v. Avon Park, 85 L.ed., 112.

3.

The lower court and the U. S. Circuit Court of Appeals failed to follow the decisions of the court of last resort of the State of Florida in determining whether or not the Petitioner was "authorized by law" as required by the Municipal Bankruptcy Act (11 U.S.C.A. 403 (6)) to carry out the provisions of the plan of composition.

(a) The part of the plan comprising the "fiscal agency" is illegal and void.

Taylor v. Williams, 195 So. 175, 184, 142 Fla. 402

W. J. Howey Co. v. Williams, 195 So. 181, 184, 142 Fla. 415

Taylor v. Williams, 196 So. 214, 142 Fla. 756

Motes v. Putnam County, 196 So. 465, 143 Fla. 134

State v. City of Fort Myers, 198 So. 814, adv. op.

(b) The plan authorizing the payment of the fees and expenses of the "fiscal agency" from funds specifically set up for the bondholders is contrary to the decisions of the court of last resort of the State of Florida.

Pierce v. Isaac, 135 Fla. 101, 184 So. 669

Motes v. Putnam County, 196 So. 465, 143 Fla. 134

Taylor v. Williams, 196 So. 214, 142 Fla. 756

(c) That part of the plan authorizing the fees and expenses of the "fiscal agent" to be paid from funds collected under authority of Article XII Section Eight of the Constitution of the State of Florida, is contrary to the Constitution and the decisions of the Supreme Court of the State of Florida.

Barrow v. Moffett, 95 Fla. 111, 116 So. 71

State v. L'Engle, 40 Fla. 392, 24 So. 539

State v. Board of Public Instruction for Indian River County, 90 Fla. 1152, 125 So. 357

Board of Public Instruction v. Kennedy, 109 Fla. 153, 147 So. 250

Bryan v. Board of Public Instruction for Broward County, 197 So. 698, 197 So. 699

(d) That part of the plan authorizing the fees and expenses of the "fiscal agent" to be paid from the "B. P. I. Homestead Levy Fund" (funds collected from

properties exempt from all taxation by the Homestead Amendment to the Florida Constitution in 1934) is contrary to the decisions of the Supreme Court of the State of Florida.

State v. West Palm Beach, 127 Fla. 849, 174 So. 337

Coral Gables v. State, 128 Fla. 878, 176 So. 43

Groves v. Board of Public Instruction for Manatee County 109 F (2d) 522

4.

The decision of the United States Circuit Court of Appeals in confirming the lower court's determination of the sufficiency of proof to substantiate a plea of res adjudicata, is contrary to the law of Florida as announced in the decisions of the Supreme Court of the State of Florida.

Bell v. Niles, 61 Fla. 114, 55 So. 392

Clem v. Meserole, 44 Fla. 234, 32 So. 815, 103 Am. S. R. 145

WHEREFORE, this Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this honorable court, directed to the Circuit Court of Appeals, commanding that court to certify to and to send to this court for its review and determination, on a day to be therein named, the full and complete record of the transcript and record in the proceedings in the case numbered and determined on this docket "No. 9596", Albert Roberts, Jr., Appellant, v. Board of Public Instruction for the County of Broward, State of Florida, Appellee, and that the

said decree of the Circuit Court of Appeals may be reversed by this honorable court, and the petitioner may have such other and further relief in the premises as to this honorable court may seem meet and just.

STUART B. WARREN,
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Attorneys for Petitioner.

WYLIE & WARREN,
of Counsel.

Brief in Support of Petition for Writ of Certiorari

I.

Reference to Opinion of Court Below

The opinion of the Circuit Court of Appeals was rendered February 19, 1941, and is reported in 117 F (2d) 943. Record P. 423.

II.

Statement of Grounds of Jurisdiction

Jurisdiction of this court is asserted under the judicial code, Sections 240 and 262, as amended, U. S. C. A. Title 28, Sections 347 and 377; Chapter 4 Section 24 C, Bankruptcy Law, as amended, Chandler Act (11 U. S. C. A. 47), and Rule 37 of this court.

III.

Statement of the Case

Inasmuch as a full statement of the case, insofar as the facts are material to a consideration of this petition, has been given in the petition for certiorari under the heading "Statement of the Case", in the interest of brevity that statement is not repeated at this point.

IV.

Specifications of Errors Intended to Be Urged

The errors commited by the Circuit Court of Appeals in its decision which are urged as a basis for consideration of this petition are:

(1) The procedure followed in the trial of the case, sanctioned by the Circuit Court of Appeals, in which

the master specifically allowed that part of the Petitioner's claim in the sum of $7,440.00 (R 241-B) (the court in the decree confirmed the allowance by the master (R 394-B, R 263-B)) and to which claim no objection was raised by the Petitioner or any other party, and to the very close of the case the claim stood as an allowed claim, and then after the case was closed the master in his final report, notwithstanding the fact that his claim had been allowed, determined that the Petitioner, not having produced evidence to establish the bona fides of the acquisition of his claim, could not complain of the discrimination of the plan against him, was such a departure from the usual and accepted judicial procedure as to deny the Petitioner his property without due process of law.

(2) The decision of the Circuit Court of Appeals is in conflict with the decisions of this court.

(3) The lower court and the U. S. Circuit Court of Appeals failed to follow the decisions of the court of last resort of the State of Florida in determining whether or not the Petitioner was "authorized by law" as required by the Municipal Bankruptcy Act (11 U. S.C.A. 403(6)) to carry out the provisions of the plan of composition.

(a) The part of the plan comprising the "fiscal agency" is illegal and void.

(b) The plan authorizing the payment of the fees and expenses of the "fiscal agency" from funds specifically set up for the bondholders is contrary to the decisions of the court of last resort of the State of Florida.

(c) That part of the plan authorizing the fees and

expenses of the "fiscal agent" to be paid from funds collected under authority of Article XII Section Eight of the Constitution of the State of Florida, is contrary to the Constitution and the decisions of the Supreme Court of the State of Florida.

(d) That part of the plan authorizing the fees and expenses of the "fiscal agent" to be paid from the "B. P. I. Homestead Levy Fund" (funds collected from properties exempt from all taxation by the Homestead Amendment to the Florida Constitution in 1934) is contrary to the decisions of the Supreme Court of the State of Florida.

(4) The decision of the United States Circuit Court of Appeals in confirming the lower court's determination of the sufficiency of proof to substantiate a plea of res adjudicata, is contrary to the law of Florida as announced in the decisions of the Supreme Court of the State of Florida.

Argument

Point I.

The procedure followed in the lower court and sanctioned by the Circuit Court of Appeals was such a departure from the usual and accepted custom of judicial proceedings as to deny the Petitioner his property without due process of law.

Upon the filing of the composition proceedings in the lower court, the Petitioner filed a sworn proof of claim showing himself to be the owner of $12,510.00 in par amount of coupons being composed in the com-

position proceedings (R 62/63-B). The Board, through its attorney, filed a written objection as to $5,070.00 in face amount of coupons owned by the Petitioner (R 58-A), and on the first day of the hearing he raised this same objection (R 98-B) and the master sustained it. It made no objection to the other part of the Petitioner's claim in the sum of $7,440.00, and the master specifically allowed that part of the claim (R 98-B, 241-B, 263-B). (The judge in the interlocutory decree confirmed the master's allowance of the claim as a claim of the Petitioner (R 394-B, R 263-B). *After the allowance of that part of Petitioner's claim in the sum of $7,440.00, no person asked for a reconsideration of it during the entire trial and to the very end of the case the claim stood as an allowed claim.* After the close of the case and on his final report, the master recognized that Petitioner's claim had been allowed (R 239-241-B), but determined that because the Petitioner had not explained the bona fides of the acquisition of his claim, he had no standing in court to object to the discrimination of the plan against him (R 239-B).

The Circuit Court of Appeals sanctioned the procedure of the lower court and determined that the Petitioner had failed to sustain the burden devolved upon him to establish the bona fides of the acquisition of his claim.

The court, through the master, by the allowance of Petitioner's claim in the sum of $7,440.00, determined that without further proof of the claim it would participate in the plan of composition.

In Re Barrett & Co., 27 F (2d) 159

Rhodes v. Elliston, 29 F (2d) 737

International Agric. Corp. v. Cary, 240 F. 101, 153 C.C.A. 137

Gleason v. Thaw, 234 F. 570

Petitioner's claim, on its allowance, became res adjudicata between the parties in the bankruptcy proceedings.

Hargadine Etc. Co. v. Hudson, 122 F. 232 (C. C.A. 8)

Sterns, Etc. Co. v. Hammond, 217 F. 559, 564 (C.C.A. 6)

Breit v. Moore, 220 F. 97 (C.C.A. 9)

Ullman, Stern & Krausse v. Coppard, 246 F. 124 (C.C.A. 5)

In Re Small Shoe Co., 5 F (2d) 956 (C.C.A. 2)

Lewith v. Irving Trust Co. (1933) 67 F (2d) 855

In Lewith v. Irving Trust Co., supra, the court said (Learned Hand speaking):

> "Such an allowance has all the substantial elements of a judgment, and has the effect of a judgment; it is res adjudicata between the parties, not only in other suits, but in the bankruptcy proceedings themselves."

Thus, to the very moment that the case closed, Petitioner's claim in the sum of $7,440.00 stood as an allowed claim.

The rule is firmly established that an objection to a claim participating in a plan of composition must be in some sufficient manner to assert a particular defense.

In Re Weidenfeldt, 277 F. 59

In Re Two Rivers Wooden Ware Co., 199 F. 877, 118, C.C.A. 325

This objection, however, must be interposed prior to the allowance of the claim.

In Re Tower Magazines, 16 F. Supp. 894

In Re Pipe Railing Construction Co., 6 F. Supp. 71

In Re Two Towers Wooden Ware Co., 199 Fed. 877

But, to make no objection whatsoever to the allowance of Petitioner's claim, stand by silent when it is allowed by the master, making no move during the entire proceedings to have the allowance of the claim re-examined so that, as far as the accepted custom of judicial proceedings at the close of the case, the claim stood as an allowed claim; then, after the case was closed and at a time when it was impossible for the Petitioner to put into testimony any evidence showing the bona fides of his acquisition of the claim (which the Petitioner could have done and can do at the present time) to determine that he had no standing to object to the discrimination of the plan against him, patently denied the Petitioner his property right to be heard in the case, in controvention of the Fifth Amendment to the Constitution of the United States.

Sanders v. Shaw, 244 U.S. 317, 61 L.Ed. 1163, 1165, 37 S.Ct. 638

Snyder v. Mass., 291 U.S. 128, 78 L.Ed. 689, 54 S.Ct. 330, 90 A.L.R. 575

Bandim Petroleum Co. v. Superior, 284 U.S. 8, 19, 76 L.Ed. 136, 144, 52 S.Ct. 103, 78 L.Ed. 826

Georgia R. & Electric Co. v. Decatur, 295 U.S. 165, 79 L.Ed. 1365, 1370, 55 S.Ct. 701

It is clear that the lower court in determining that it was unnecessary for the Petitioner to explain the acquisition of his claim, and then after the case was over and at a time when it was impossible for him to make such explanation, to condemn him for not making such an explanation, certainly deprived him of one of the fundamental rights guaranteed by the Constitution of the United States—an opportunity to be heard before he is condemned. It is respectfully submitted that this point alone is entirely sufficient for this court to give the Petitioner the relief asked for.

Point II.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the Supreme Court of the U. S. as announced in American United Life Insurance Co. v. Avon Park, 85 L.ed. 112; Case v. Los Angeles Lumber Co., 308 U. S. 106.

The Supreme Court of the United States in the case of American United Life Insurance Co. v. Avon Park, 85 L.ed. 112, specifically pointed out that any such "fiscal agency" contract should be passed upon by the courts in determining whether or not a plan of composition should be confirmed, the court saying as to the fiscal agency contract:

> "It is, however, a relevant inquiry to be made by the district court, as, if and when another plan of composition is presented which directly or indirectly involves any such fiscal agency contract."

The opinion of the Circuit Court of Appeals con-

firming the interlocutory decree in this case states, as to the Petitioner:

> "More than 74% of the creditors have assented to it and have affirmatively approved it and the exercise of no legal right which he could assert would have availed to defeat the plan of composition."

The Supreme Court of the United States in Case v. Los Angeles Lumber Co., 308 U. S., 114, 115, 84 L.ed. 119, and in American United Life Insurance Co. v. Avon Park, 85 L.ed. 112, squarely enunciated the rule that a bankruptcy court is no ministerial register of the votes of the various creditors; that a plan of composition must satisfy *all* of the requirements of the act before it can be confirmed; that an acceptance by the requisite majority is no substitute for the other mandatory requirements of the act. It is respectfully submitted that the mere fact that in the instant case 74% of the creditors had accepted the plan is no indication of whether or not the plan complies with the other mandatory provisions of the act. This is particularly true in the present case, when under the decisions of the Supreme Court of the State of Florida, the plan is plainly illegal. The mere fact that 74% of the creditors (12% being represented by a corporation of which the fiscal agent is President) approve an illegal plan definitely does not mean that the other 26% of the creditors must take it.

Point III.

The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the State of Florida in determining that the Board of Public Instruction was "authorized by law" as re-

quired by the Act (11 U.S.C.A. 403 (e) (6)) to carry out the provisions of the plan of composition.

This court, in Bekins v. Lindsay Strathmore Irrigation District, 308 U. S. 27, 49, 82 L.ed. 1137, 1143, specifically pointed out that:

> "It should also be observed that Chapter X Sec. 83(e) provides as a condition of confirmation of a plan of composition that it must appear that the petitioner 'is authorized by law to take all action necessary to be taken by it to carry out the plan' and, if the judge is not satisfied on that point as well as on the others mentioned, he must enter an order dismissing the proceedings. *The phrase 'authorized by law' manifestly refers to the law of the State* (11 U.S.C.A. 403)." (Emphasis added)

Consequently, the district court and the circuit court of appeals fell completely in error in a determination that the Board "was authorized by law" to carry out the plan, when under the decisions of the Supreme Court of Florida, every phase of the fiscal agency has been declared illegal and void. Each particular part of the plan, and its patent illegality, under the decisions of the Supreme Court of Florida, are herein particularly pointed out:

(1) The plan authorizing the "fiscal agency" is illegal and void.

Taylor v. Williams, 195 So. 175, 184, 142 Fla. 402

W. J. Howey Co. v. Williams, 195 So. 181, 184, 142 Fla. 415

Taylor v. Williams, 196 So. 214, 142 Fla. 756

Motes v. Putnam County, 196 So. 465, 143 Fla. 134

State v. City of Fort Myers, 198 So. 814, adv. op.

The plan of composition provided that the "fiscal agent", under his contract with the Board, was to perform all acts necessary in carrying out the plan of composition, including the furnishing of attorneys, the validating opinion of attorneys, the printing of the new bonds, and all other services in issuing the refunding bonds. For this service the Board of Public Instruction agreed to pay him twenty (20) per cent of the amount of the interest coupons discharged by the proceeding (approximately $35,000.00). The Board of Public Instruction of Broward County, Florida, is a quasi corporation, having very limited powers (see Appendix, page 43). It was created as a means of carrying out the provisions of the Constitution relating to the funds for the public free schools of Florida, as set forth in Article XII Sections Eight and Nine of the Constitution of the State of Florida. Obviously, any such contract as is attempted to be confirmed in this proceeding is absolutely illegal, ultra vires and void. The Supreme Court of Florida has consistently struck down similar contracts and has refused even to allow and *Board of Public Instruction* of Lake County, Florida, to be re-imbursed for fees and expenses already paid to a refunding agent under a contract similar to the one in this proceeding.

In the case of Taylor v. Williams, 195 So. 175, a refunding agent had entered into a contract with Lake County, Florida, to act as its fiscal agent in and about the consummation of a refunding plan. The agent in that case was to perform the same duty imposed on the refunding agent in the case at bar. The similarity of the two cases is herewith shown:

Taylor v. Williams, 195 So. 175, 142 Fla. 756:

"That first party (R. E. Crummer & Company) shall defray all expenses incident to assembling and exchanging the bonds herein proposed to be refunded, printing the said refunding bonds, the representation of Second Party (the county commissioner) in legal proceedings to validate said refunding bonds, obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said Refunding Bonds, said counsel to be selected by First Party; all other expenses in connection herewith which may be approved by First Party."

Board of Public Instruction for Broward County, Florida:

Broward County refunding agent shall pay all expenses of plan of composition, attorneys fees for refunding agent, attorneys fees for validation of bonds, court costs, depositary fees, costs of printing bonds, approving attorney's opinion, and all costs expended or to be expended in formulating and carrying out this plan of composition or any amended plan, and exchanging the refunding bonds. (R. 354-B) (R. 16-A)

In the first opinion by the Supreme Court of Florida in Taylor v. Williams, supra, in which case a taxpayer had asked for an injunction to restrain the Board from carrying out the contract, the court referred to the refunding agent's contract, and said:

"Is the new 2 percent refunding agreement dated August 7, 1939, complained of in the Taylor bill (Taylor Record, page 43) void, and should its performance have been enjoined?"

The court then observed that in issuing bonds to be paid by taxation the official duties of the county com-

missioners include the function of providing for the legal fiscal matters; that the law does not contemplate the employment of a fiscal agent to act for a county in managing or controlling official functions in issuing refunding bonds, and said:

> "Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. Pierce v. Isaac, 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.
>
> "The refunding resolutions and contracts are not in accord with law, and the bill of complaint should not have been dismissed."

In the companion case of W. J. Howey Co., et al., v. Williams, 195 So. 181, the court said:

> "The law contemplates that all official authority, duties and functions shall be exercised and performed by duly commissioned officers; the delegation of official authority, duties or functions by officials to non-officials is not permitted by the laws of this State."

A second petition for rehearing was filed (the first petition for rehearing having been denied, 195 So. 184) in which an attempt was made to have the court modify its former opinion so that fees illegally paid could be recovered. In the opinion on the petition for rehearing it was specifically pointed out that the *Board of Public Instruction* of Lake County had also entered into a refunding contract with R. E. Crummer and Company, having duties similar to that of the refunding agent

in this case. The duties of the fiscal agent with the *Board of Public Instruction of Lake County* were also held to be illegal (196 So. 214):

> "That under the terms of the said refunding contract the board of county commissioners, on behalf of the County of Lake and of said road district, and the *board of public instruction*, on behalf of said school districts, agreed to pay said refunding agency, or R. E. Crummer & Company, two per cent on the par value of all bonds refunded in exchange for refunding bonds in consideration of accomplishing said refunding schemes and the employment and payment of counsel to approve the refunding bonds, and the employment and payment of counsel to refund the county or taxing districts severally in proceedings brought to validate the bonds of said taxing units severally."

* * *

The opinion further pointed out that the Board had already paid part of these fees, saying:

> "That at like periods the *Board of Public Instruction* of said county paid said refunding agency more than $13,000.00 as refunding fees. That since the dates aforesaid, further sums have been paid or caused to be paid by said board of county commissioners, and said Board of Public Instruction as refunding fees either to the members of said refunding agency or to R. E. Crummer & Company, or their nominees, aggregating large sums of money." (Emphasis ours)

* * *

In refusing to modify its first opinion, the court said:

> "Ad valorem taxes levied for, and taxes allocated

to county and road and bridge district bond payments can not legally be used for refunding bond expenses, or commingled with revenues raised to pay bond expenses."

Again, in Motes v. Putnam County, (196 So. 465), supra, the court specifically reiterated its previous holding that such refunding contract was illegal and contrary to the laws of the State of Florida.

There is absolutely no difference in the contract that R. E. Crummer & Company had with the Board of Public Instruction of Lake County, which was struck down by the Supreme Court of Florida, supra, and the case at hand. The principle is precisely the same in both cases.

(2) (a) *Payment of fees and expenses of fiscal agent from funds set up for bondholders, is illegal and void.*

Pierce v. Isaac, 135 Fla. 101, 184 So. 669

Motes v. Putnam County, 196 So. 465

Taylor v. Williams, 196 So. 214

The Supreme Court of the State of Florida has specifically passed upon the question of whether or not a fiscal agent's fee can be hidden in a fund set up for the holders of refunding bonds, and subsequently paid from the taxes reportedly levied for these refunding bonds. In Pierce v. Isaac, supra, the Supreme Court of the State of Florida struck down a similar provision, in which the fees for the refunding agent were to be paid from the interest and sinking fund set up for the

refunding bondholders. This law was again reiterated and firmly established in the case of Taylor v. Williams, 195 So. 175, where the court said:

> "Nor does the law permit the payment of money from the sinking funds of the county or districts as fees for a refunding agent. Pierce v. Isaac, 135 Fla. 101, 184 So. 669. When such an agent may legally be employed for services in no wise official in their nature, proper compensation for such service may be provided for as the law authorizes.
>
> "The refunding resolutions and contracts are not in accord with law, and the bill of complaint should not have been dismissed."

Moreover, the very cases in which the Supreme Court validated the bonds to be issued under this proceeding, Bryan v. Board of Public Instruction for Broward County, 195 So. 697; 195 So. 698; 195 So. 699, the court specifically pointed out on page 697 that funds set up for bondholders could never be used for refunding agent's fees. Also in Taylor v. Williams, 196 So. 214, the Supreme Court on a petition for rehearing and for a modification of its original opinion said:

> "Ad valorem taxes levied for and taxes levied to county and road and bridge district bond payment *can not legally be used for refunding bond expenses or commingle with funds raised to pay bond expenses.*"

(b) *Payment of fees and expenses of fiscal agent from funds collected under authority of Article XII, Section Eight of the Constitution of Flori-*

da, is contrary to the Constitution of Florida and decisions of the Supreme Court of Florida.

State v. L'Engle, 40 Fla. 392, 24 So. 539

State v. Board of Public Instruction for Indian River County, 90 Fla. 1152, 125 So. 357

Board of Public Instruction v. Kennedy, 109 Fla. 153, 147 So. 250

Barrow v. Moffett, 95 Fla. 111, 116 So. 71

Bryan v. Board of Public Instruction for Broward County, 197 So. 698, 197 So. 699

Under the provisions of the scheme of refunding as proposed by the refunding agent in his plan of composition, it was provided that the fees and expenses incurred by him in performing the various duties set out by him should be paid from the proceeds of taxes levied for the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund" over a period of five years (R. 16, 17-A) (R. 354-B). These two funds (R. 19-A) are set up for the benefit of the refunding bondholders, and are the proceeds of a part of the ten mill tax levy imposed under the authority of Article XII Section Eight of the Constitution.

That funds raised under Article XII Sections Eight and Nine of the Constitution (See Appendix Page 47 for constitutional provision) can never be diverted from the schoool fund to pay such fees as have been incurred under the illegal contract entered into with the refunding agent is squarely and firmly imbedded in the adjudicated decisions of the Supreme Court of Florida. Those funds must remain inviolate for the benefit of the

public free schools, and they can never be diverted to any purpose other than the operation of such public free schools in the county. State v. L'Engle, 40 Fla. 392, 24 So. 539; State v. Board of Public Instruction for Indian River County, 90 Fla. 1152, 125 So. 357; Board of Public Instruction v. Kennedy, 109 Fla. 153, 147 So. 250. The Supreme Court of Florida, in State v. L'Engle, supra, referred to the funds collected under authority of Article XII of the Constitution, and said:

> "The school fund has been segregated by the constitution from the general county funds, and *must be levied for this distinct purpose.* Whatever burdens of county taxation can be imposed for such purpose must be in aid of and constitute a part of the county school fund, and *no authority can be given to direct it from the objects specified in the constitution.*" (Emphasis ours)

Moreover, the case of Barrow v. Moffett, 95 Fla. 111, 116 So. 71, presents a situation precisely similar to that now attempted by the scheme set forth in the refunding agent's plan. In that case, the Board of Public Instruction of Highlands County, Florida, attempted to validate bonds to raise funds to pay the outstanding *floating indebtedness* of the Board of Public Instruction of that County. The bonds were to be paid from "a part of the tax provided for by the 'section (12)' of the Constitution of the State of Florida". In that case the attempted authority to issue the bond for the payment of the floating indebtedness came from a specific act of the legislature of the State of Florida; in this case the authority to levy taxes for the purported indebtedness incurred by the board in and about its contract with the fiscal agent (to be paid over a period of five

years) is found in the provisions of the plan of composition (R. 17-A); moreover, the agent's fee and expenses are to be paid from the proceeds of taxes provided for by Article XII of the Constitution of the State of Florida, as were the bonds in the case of Barrow v. Moffett, supra. The situation is precisely as if the sum of Thirty-Five Thousand Three Hundred Sixty-Two and 92/100 Dollars ($35,362.92), being the amount of the fiscal agent's fees and costs, were to be paid by the issuance of a series of bonds payable from a part of the tax provided for by Article XII of the Constitution of the State of Florida, and payable serially over a period of five years. The Supreme Court of Florida, in Barrow v. Moffett, supra, said that even when authorized by an act of legislature, such similar procedure would be illegal and unconstitutional:

> "The statute cannot be sustained, since Sections Eight and Nine of Article XII expressly and specifically provide that the funds collected as taxes under Section Eight, shall be used 'for the support of the public free schools' in the county (Section Eight) and 'solely for the maintenance and support of public free schools' (Section Nine)" . . .
>
> * * *
>
> "The act here considered purports to authorize bonds to be issued to pay 'an outstanding indebtedness incurred in the support and maintenance of the public free schools of said county, evidenced by warrant, notes, open accounts, or otherwise incurred for *services* and/or labor performed, materials, and/or supplies furnished and for money loaned to and received by the Board of Public Instruction' the bonds to be paid from 'a part of the

> tax provided for by Section 12 of the constitution.' The constitution contemplates the payment when due of expenses for maintenance and support of schools, and does not contemplate the issue of bonds to pay for past indebtedness." (Emphasis ours)

There is absolutely no difference whatsoever in principle between paying the indebtedness incurred under the refunding agent's contract from school funds levied under the authority of Article XII Section Eight of the Constitution over a period of five years, and issuing bonds for this same indebtedness and having the bonds paid over the same period of five years. *If the one is illegal, as in Barrow v. Moffett, supra, so is the other, as contemplated under the Plan.*

If the Board of Public Instruction could not legally issue serial bonds maturing over a period of five years to pay this purported indebtedness incurred in its contract with the refunding agent (which is clearly illegal) even if it were attempted to be validated by an act of the legislature, as in Barrow v. Moffett, supra, how can it possibly be said that the board "would be authorized by law" to pay the same indebtedness over a period of five years without the issuance of bonds, but acting under the authority of the provisions of a plan of composition, particularly when the Municipal Bankruptcy Act itself requires the Petitioner to "be authorized by law to take all action necessary to be taken by it to carry out the plan"? (11 U. S. C. A. 403 (e) (6)) That such a plan is illegal was specifically pointed out in the opinion validating the bonds to be issued hereunder (page 697) where the Supreme Court of Florida referred to the general school fund, saying that it could

never be used for any other purpose other than for the schools and for repaying this indebtedness:

* * *

> "And the use of any other portion of the general school fund of Broward County for the purpose of payment of interest on the refunding bonds, *including refunding expenses* . . . 'would not be authorized unless by a vote of the people'."

Obviously, the payment of the purported indebtedness to the refunding agent from funds pledged to the public free schools is contrary to the specific provisions of the Constitution of the State of Florida, particularly Article XII Sections Eight and Nine, but if the contract can not be legally consummated, then the board is not "authorized by law to take all action necessary to carry out the provisions of the plan" as required under 11 U. S. C. A. 403 (d) (6).

(c) *Payment of fees and expenses of fiscal agent from taxes levied on properties exempt by the Homestead Amendment to the Florida Constitution from all taxation (from the "B. P. I. Homestead Levy Fund") is prohibited by the Constitution of the State of Florida.*

State v. City of West Palm Beach, 127 Fla. 849, 174 So. 337

City of Coral Gables v. State, 128 Fla. 874, 176 So. 43

Groves v. Board of Public Instruction for Manatee County, 109 F. (2d) 522

The court was patently in error when it determined that taxes could be levied against properties exempt under the Florida Homestead Amendment from all taxation, for the purpose of paying the purported indebtedness incurred by the board by its illegal contract with the fiscal agent.

Under the plan of composition (R. 17-A) provision was made that the costs and fee of the refunding agent should be a lien upon and be paid from the two funds set up for the bondholders, the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund". In the interlocutory decree, the court referred to and ordered the Board to pay the sum of Thirty-Five Thousand Three Hundred Sixty-Two Dollars and Ninety-Two Cents ($35,362.92) "from the 'B. P. I. Bond Fund' and the 'B. P. I. Homestead Levy Fund' set up in the plan of composition, the above mentioned fees and expenditures". (R. 406-B). The two funds, the "B. P. I. Bond Fund" and the "B. P. I. Homestead Levy Fund", are separate and distinct funds. The "B. P. I. Bond Fund" is a fund collected only from taxes levied upon all properties not exempt by the Homestead Amendment for taxation. The "B. P. I. Homestead Levy Fund", as stated in the plan (R. 15-A.):

> "shall be composed of the proceeds of a 10 mill levy under Section Eight of Article XII of the Constitution of Florida, *levied against the assessed valuation of homestead property in Broward County, Florida* . . . " (Emphasis ours)

Thus it is that the "B. P. I. Homestead Levy Fund" is limited to that property which was and is exempt by the Constitution of the State of Florida under Article

X, Section Seven, from all taxes except special assessments. The unrefunded bonds having been executed and issued prior to the passage of this amendment, obviously carry the same pledge to them in the new refunding bonds. State v. Clearwater, 125 Fla. 73, 169 So. 60; Folks v. Marion County, 121 Fla. 17, 163 So. 298; 102 A. L. R. 659; Flaming v. Turner, 122 Fla. 200, 165 So. 353; State v. West Palm Beach, 127 Fla. 849, 174 So. 337. As to any such new indebtedness or bonds issued for indebtedness incurred subsequent to this Homestead Amendment (1934), all of that property, and particularly that property referred to in this plan as "homestead property" is not taxable therefor, and any tax imposed on such property for it is void and contrary to the Constitution of Florida. In attempting to impose a tax against this homestead exempt property in the plan of composition for the refunding agent's fees and costs incurred under his purported contract, signed May 2, 1939, years after the passage of the Homestead Amendment, clearly violated the Florida Constitution, and the Board is not authorized by law to carry out a plan having such provisions incorporated in it.

The City of West Palm Beach, Florida, in State v. City of West Palm Beach, 127 Fla. 849, 174 So. 337, attempted to issue refunding bonds to pay off a floating indebtedness of the City, incurred subsequent to the passage of the Homestead Amendment to the Constitution of the State of Florida. The lower court validated the refunding bonds, but on an appeal, the Supreme Court of Florida refused to validate the new bonds observing that when refunding bonds constitute extensions of the old indebtedness, homesteads would

naturally be liable for taxes to service the new bonds, but as to new indebtedness, created after the passage of the amendment, the court said:

> "This condition, however, does not apply to the funding bonds issued to fund a floating debt as to which there was no prior contract for tax levies. These bonds and interest certificates constituted a new and independent contract for the payment of which the levy of a tax upon homesteads is prohibited under Section Seven Article X, of the Constitution (as added in 1934)."

Moreover, this proposition was firmly enunciated again in City of Coral Gables v. State, 128 Fla. 874, 176 So. 43, when that unit attempted to refund certain judgments and open accounts incurred subsequent to the passage of the Homestead Amendment. The lower court refused to validate that part of the indebtedness representing such judgments and open accounts, because homesteads would have been taxes to pay such refunding bonds. On an appeal to the Supreme Court of Florida, that court referred to the West Palm Beach decision, and said:

> "In the decision of State v. West Palm Beach, 174 So. 334, this court reversed a decree of the trial court validating refunding bonds for the purpose of refunding a floating debt. A part of the floating debt embraced a stated account similar to the one here involved. We held that the refunding bonds and interest certificates, sought to be issued and validated, constituted a new and independent contract for the payment of which the levy of a tax upon homesteads was prohibited by Section Seven, Article X of the Constitution. The facts and the charter provisions here are not ma-

> terially different. It therefore follows that the trial court in this case correctly held that the stated account could not be used as a basis for refunding bonds, supported by a levy against a homestead, exempt under Section Seven, Article X of the Constitution."

Moreover, in the case of Groves v. Board of Public Instruction for Manatee County, 109 F. (2d) 522, a mandamus was directed to the board, commanding it to make available funds to pay a judgment rendered on bonds issued by the *Board of Public Instruction of Manatee County, Florida.* The defense made was that the Homestead Amendment had been passed and that the levy could be made only against non-exempt homestead property. It was pointed out in that case that homestead property (the property referred to in the plan of composition as the "homestead Levy Fund") *was exempt even from taxation levied for the support of the public free schools:*

> . . . "and under the Homestead Amendment, Section Seven, Article X of the Florida Constitution, homesteads up to the value of $5,000.00 were exempt from any tax levied for the support of the public free schools."

If bonds had been issued by the Board of Public Instruction to pay the fees and expenses of the refunding agent, and these bonds were to be re-paid over a period of five years from the "B. P. I. Bond Fund" and from the "B. P. I. Homestead Levy Fund", it is obvious that a taxpayer could (1) enjoin the issuance of these bonds; and (2) enjoin the levy of any taxes for the payment of the bonds, because such levy of taxes and the issuance of any bonds would run afoul of the Homestead

Amendment to the Constitution of Florida. That a plan of composition could not be confirmed when such is the case was particularly pointed out in American United Life Insurance Company v. Avon Park, Florida (supra). The court, in that case, said:

> "Under Section 83(e)(6), 11 U.S.C.A. Sec. 403 (e)(6), the court must be satisfied that the city 'is authorized by law to take all action necessary to be taken by it to carry out the plan' before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds *or the levy of assessments therefore.* The courts below did not pass on the applicability of these recent Florida decisions to this fiscal agency contract since they were decided after the Circuit Court of Appeals affirmed the order of confirmation. Nor do we undertake to decide the question in view of our disposition of the case. *It is, however, a relevant inquiry to be made by the District Court as, if and when another plan of composition is presented, which directly or indirectly involves any such fiscal agency contract.*" (Emphasis ours)

It is patent that the indebtedness incurred under the contract with the fiscal agent can not be paid, even if it were authorized to be paid from any school fund, from levies upon properties which are exempt from all taxations under the authority of the Homestead Amendment. *Those properties are even exempt from all levies for maintenance and support of the public free schools.* It is hard to understand how the master fell into such error, in not recognizing this obvious illegality of the plan. For this obvious illegality in the plan, if for no other reason, the Board was not authorized by law "to

take all action necessary to be taken by it to carry out the plan," as required under 11 U. S. C. A. 403 (e) (6).

Point IV.

The decision of the Circuit Court of Appeals in sustaining the objection by the Board to part of Petitioner's claim is contrary to the decision of the Supreme Court of Florida.

It will be observed that the special master disallowed that part of the Petitioner's claim in the sum of $5,070.00 in face amount of coupons which had been objected to by the Board. He allowed the other part of Appellant's claim in the sum of $7,440.00. The only evidence the master had before him in determining that the Turner suit was res adjudicata was the verdict and judgment in that case. The record affirmatively shows that there was no showing that the Petitioner was in privity with the plaintiff in the Turner case. The complete file in the Turner suit was not submitted in evidence to substantiate the objection based on res adjudicata, although the then attorney for this Petitioner specifically objected to the introduction of any part of the Turner case without the complete file. The record reads:

"The Master:

Are you offering in evidence the entire file?

Mr. Ross:

Not the entire file.

The Master:

Or just a part of the file that you are substituting copies for?

Mr. Ross:

I am introducing the originals of exhibits of which I have made copies.

Mr. Warren:

I object to this if the Court pleases because it doesn't give the entire record."

The master overruled the objection and allowed the verdict and judgment to be placed in evidence. In answer to the contention of the attorney for the Appellant that the whole file should be submitted, the master said (R. 85-B):

"The Master:

It is my feeling about it that the final judgment would be sufficient. Objection overruled. Admitted in evidence. (Emphasis ours)

"(Said true copy of verdict, final judgment, petition to remove exhibits, order allowing withdrawal of exhibits, receipt for exhibits, and mandate of the Circuit Court of Appeals in case of N. A. Turner as Trustee vs. Board of Public Instruction for Broward County, was admitted in evidence as Petitioner's Exhibit No. 3)."

No other evidence was introduced by the Board to show that the judgment in that case barred the Appellant from pursuing his claim, nor was there any evidence to show that he was in privity with the plaintiff in that case.

That the Master was completely in error in allowing the introduction of the judgment without the complete file hardly admits of argument. Bell v. Niles, 61 Fla. 114, 55 So. 392; Clem v. Meserole, 44 Fla. 234, 32 So. 815, 103 Am. S. R. 145.

In the case of Bell v. Niles (Fla.), supra, exactly the same question was raised. There a defendant to substantiate a plea of res adjudicata attempted to introduce a judgment of a former case between the same parties, without introducing the complete file. The plaintiff objected to the introduction of the judgment without the whole file being placed in evidence. The trial court sustained the objection and thereupon the case was appealed to the Supreme Court of Florida, and that court pointed out (55 So. page 395):

> "No extended discussion of this assignment is necessary. The proferred judgment was properly excluded, if for no other reason, though such ground was not specifically urged, that under our holding in Little Brothers v. Barlow, 37 Fla. 232, 20 So. 240, 53 Am. St. Rep. 249, 'In order to sustain the contention of *res judicata,* the *complete* record in the former suit, including the judgment therein should be produced, and not incomplete or detached portions thereof.' See also Foot v. Glover, 4 Blackf. (Ind.) 313, there cited and, 23 Cyc. 1538." (Emphasis by the court)

So, also, Clem v. Meserole (Fla.), supra, and where the court said:

> "Under the decisions in this State it is clear that a judgment entry alone, unaccompanied by any other part of the record of such judgment, or any sufficient explanation of its absence, when offered in evidence for a purpose other than to show the fact

> of its rendition, is inadmissible if seasonably objected to."

it further observed:

> "A party is entitled to have the whole record, so far as it concerns the formal stages, produced, because such record is a material part of the judgment, and because he has a right to insist that the presumptions applicable to judgments of courts of general jurisdiction shall be applied only when it is ascertained from an inspection of the whole record that it does not affirmatively appear therefrom that the court did not have jurisdiction to render the judgment."

Manifestly, the ruling of the Master in allowing the introduction of the verdict and judgment in the Turner case was complete error. It proved nothing. It did not show that the issues in that case were the same, as those of the appellant. This, of itself, it is submitted, is sufficient to completely destroy any attempt thus made on the part of the Board to relieve itself from the payment of this part of its indebtedness by hiding behind a plea of res adjudicata. If the Master had ruled correctly and in accordance with the rule clearly enunciated in the two Florida cases cited above, no evidence would be in the record whatsoever to substantiate his findings. And even if that evidence now in the record be considered, it is insufficient, as a matter of law, to substantiate the plea of res adjudicata.

Conclusion

In conclusion, we respectfully submit:

(1) That the procedure followed in the lower court and countenanced by the Circuit Court of Appeals

patently denied this Petitioner of his fundamental right to be heard in the case; that the action of the lower court in determining at the very outset of the case that his claim would be allowed, no objections being interposed thereto and to the very end of the case, his case standing as an allowed claim, and then after the case was closed to determine that because he had not sustained the burden of proof in showing the bona fides of the acquisition of his claim, was such a departure from the usual and accepted custom of judicial proceedings as to deny this Petitioner his property without dues process of law;

(2) The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the United States and of the State of Florida in determining whether or not the Petitioner was "authorized by law" to carry out the provisions of the plan of composition;

(3) The lower court and the Circuit Court of Appeals failed to follow the decisions of the Supreme Court of the State of Florida in determining that an objecton to a part of Petitioner's claim, based upon a plea of res adjudicata, had been sustained.

Respectfully submitted,

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Attorneys for Petitioner.

WYLIE & WARREN,
of Counsel.

Appendix

I.

Section 523, Compiled General Laws of Florida, 1927; Section 447, Revised General Statutes of Florida, 1920:

"County Boards to be corporations—Each Board of Public Instruction is constituted a body corporate by the name of 'The Board of Public Instruction for the County of ————, State of Florida,' and in that name may acquire and hold real and personal property, receive bequests and donations, and perform other corporate acts for educational purposes. (Ch. 4196, Acts 1893, and Ch. 3872, Acts 1889, Sec. 13.)"

II.

Section 561, Compiled General Laws of Florida, 1927; Section 454 Revised General Statutes of Florida, 1920:

"Duties of Board of Public Instruction.—Each board of public instruction is directed:

"First.—To obtain possession of, accept and hold, under proper title, as a corporation, all property possessed, acquired or held by the county for educational purposes, and to manage and dispose of the same for the best interest of education: Provided, that nothing in this law shall be so construed as to prevent any special tax school district from holding school property that it has, or may hereafter acquire, for school pur-

poses, or prevent such districts from receiving their portions of money set apart for school purposes.

"Second.—To locate and maintain schools in every locality in the county where they may be needed, to accommodate, as far as practicable, all the youth between the ages of six and twenty-one years, during not less than four months in each year.

"Third.—To appoint one supervisor for each school on the recommendation of the patrons, whose duty it shall be to supervise the work of the school and to report to the county superintendent of public instruction monthly the result of his observations.

"Fourth.—To select and provide a site for each school house of not less than one-half acre of ground in the rural districts, and as nearly that amount as is practicable in the villages or cities. The situation to be dry, airy, healthful and pleasant, also reasonably central and convenient of access for all who should attend the school.

"Fifth.—To do whatever is necessary with regard to purchasing or renting school sites and premises, constructing, repairing, furnishing, warming, ventilating, keeping in order or improving the school houses, out buildings, fences, land and movable property, procuring proper apparatus for the schools, grading and classifying the pupils, and providing separate schools for the different classes in such a manner as will secure the largest attendance of pupils, promote the harmony and advancement of the school, and establishing, when required by the patrons, schools of higher grades of instruction where the advancement and number of the pupils require them.

"Sixth.—To employ teachers for every school in the county, and to contract with and pay the same for their services: Provided, that schools shall not be located nearer than three miles to each other, unless for some local reason or necessity.

"Seventh.—To audit and pay all accounts due by the Board of Public Instruction.

"Eighth.—To keep accurate accounts of all their official acts, proceedings and decisions, of all moneys received, held or disbursed, of all property acquired or disposed of, in a proper set of account books, and a record of the state and condition of each school, and to report the same to the State Superintendent of Public Instruction when required. They shall also at the close of the scholastic year prepare an itemized report of all moneys by them received and disbursed.

"Ninth.—To prepare and file with the clerk of the circuit court of their respective counties by the first Tuesday after the first Monday in every month, an itemized financial statement showing all sums of money received during the month next preceding, on account of county school funds, and from whom received, and from what source derived, all appropriations made by such board, and for what purpose made, all warrants drawn by such board, in whose favor and for and on what account drawn, describing such warrant by date, number and amount. All such monthly financial statements shall be certified by the chairman of the board of public instruction for the county, and attested by the county superintendent of public instruction, and the said board shall without delay cause the same to be published in a newspaper of the county, when any such newspaper

exists: Provided, that the cost of such monthly publication shall not exceed two dollars per month; otherwise they shall post the same at the court house and at three other public places in the county.

"Tenth.—To prescribe, in consultation with prominent teachers, a course of study for the schools of the county and grade them properly; and to require to be taught in every public school in the county over which they preside, elementary physiology, especially as it relates to the effects of alcoholic stimulants and narcotics, morally, mentally, and physically; and all persons applying for certificates to teach shall be examined upon this branch of study, under the same conditions as other branches required by law.

"Eleventh.—To perform all acts reasonable and necessary for the promotion of the educational interests of the county and the general diffusion of knowledge among the citizens.

"Twelfth.—To hold regular meetings for the transaction of business, by arrangement with the State Superintendent of Public Instruction, and to convene a special session on emergencies when requested by the county superintendent of public instruction.

"Thirteenth.—To prepare, on or before the last Monday in June of each year, an itemized estimate showing the amount of money required for the maintenance of the necessary common schools of their county for the next ensuing scholastic year, stating the amount in mills on the dollar of taxable property of the county, which shall not be less than three or more than ten mills, and furnish a copy of the statement to

the assessor of taxes of the county, and file a copy in the office of the board of public instruction; and the assessor shall assess the amount so stated, and the collector shall collect the amount assessed and pay over the same monthly to the county depository, which is also by law school treasurer, to be used for the sole benefit of the public schools.

"Fourteenth.—To select candidates for admission to the State colleges and seminaries.

"Fifteenth.—To examine at least twice each year the books and records of the tax collector which relate to the collection of poll taxes, and said board shall require prompt settlement for all poll taxes assessed, together with those not assessed, but collected. Any member of a county school board who neglects to comply with the provisions of this law shall be suspended from office. (Ch. 3872, Acts 1889, Secs. 16, 20: Ch. 4332, Acts 1895, Sec. 3, revised; Ch. 4666, Acts 1899, Sec. 1.)"

III.

Article 12 of the Constitution of Florida, Sec. 8.

"Section 8. Each county shall be required to assess and collect annually for the support of the public free schools therein, a tax of not less than three (3) mills, nor more than ten (10) mills on the dollar on all taxable property in the same. (Amendment of 1904, Joint Resolution 2, Acts 1903, making the maximum seven (7) mills, as amended by Joint Resolution 25, Acts 1917, and adopted at general election, 1918.)

MAY 13 1941
CHARLES ELMORE CROPLEY
CLERK

NO. 972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ALBERT ROBERTS, JR.,
Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

NO. 972

ALBERT ROBERTS, JR.,

Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,

Respondent.

STATEMENT OF THE CASE

On May 2, 1939, the Board of Public Instruction for the County of Broward, State of Florida, approved a Refunding Plan for the voluntary exchange of certain outstanding bonds for new refunding bonds (R 11/19A). This Refunding Plan named Ralph A. Horton as Refunding Agent, and provided he should attempt to contact the holders of outstanding bonds and seek a voluntary exchange of bonds. For refunding fees and expenses of exchange, he was to receive a fee equal to 20% of the amount of coupons on

said bonds, or approximately $35,000. The Refunding Plan further provided, that the taxing division might use the same as a Plan of Composition in Bankruptcy proceedings, if it so desired (R 17A).

Later the taxing division decided to use the Plan, with proper amendments, as a Plan of Composition in bankruptcy, and on June 16, 1939, filed a petition in the United States District Court under the provisions of Chapter IX of the Bankruptcy Act (11 USCA 401-403) (R 1/11A). The Petition for Composition of Debts provided (R 5A, paragraph 11) that the Plan be modified to conform to the provisions of the Bankruptcy Act. Every step in the proceedings was taken by the taxing division and not by the Refunding Agent (R274/276 B), and all fees and expenses were approved by the bankruptcy court. (R 405/406 B). As a result the fees of the Refunding Agent were cut to $11,000 and allowed in that amount by the District Court (R 406 B).

The Plan of Composition, as amended, provided that the taxing division would exchange new bonds, bearing interest at 3% for 15 years and 4% for 15 years for the outstanding bonds, with all coupons attached. Fifty-seven claims were filed in the bankruptcy proceedings, and only two claimants objected to the Plan of Composition. Ed. C. Wright & Company, a corporation, filed claim No. 52 (R 58/59B) and Albert Roberts, Jr., Petitioner here, and Vice-President of Ed. C. Wright & Company, filed claim No. 54, involving $12,510.00 face amount of coupons clipped from the bonds filed under the corporation's claim No. 52.

The Board of Public Instruction objected to claims Numbered 52 and 54, filed by the corporation and its Vice-President, upon the grounds that both claims involved bonds and coupons which

could not be refunded under the Plan of Composition (R 58/60 A) and further objected to the allowance of claim No. 54, in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr., and the taxing division submitted positive proof to this effect, and proved to the satisfaction of the Special Master (R 235/241 B) and the Court (R 306 B and R 394 B) that the Vice-President had split the claims in order to create an artificial and technical issue.

In the face of the objection by the taxing division as to the split claims, Ed. C. Wright & Company took no further steps, never appeared by counsel to object at any stage of the proceedings, and eventually exchanged some valid, allowed and exchangeable bonds described under its claim No. 52. The objecting creditor, Albert Roberts, Jr., the Vice-President of the corporation, has appeared by counsel to object to every step in the proceedings. He first took an appeal to the Circuit Court of Appeals on the question of the constitutionality of the Bankruptcy Act as applied to a Board of Public Instruction, and the Act was held applicable to such taxing division in the case of Albert Roberts, Jr. vs. Board of Public Instruction for Broward County, Florida, 112 Fed. (2nd) 459. After objecting at every stage of the proceedings, he again appealed to the Circuit Court of Appeals from the Interlocutory decree in the case of Roberts vs. Board of Public Instruction for Broward County, Florida 117 Fed. (2nd) 943. He now files Petition in this Court, seeking a Writ of Certiorari.

The pretended claim of Albert Roberts, Jr., Petitioner here, involves coupons of the face amount of $12,510.00 which were

supposed to have been clipped from bonds filed under the corporation claim. Of such coupons, the amount of $5,070.00 could not be refunded, on account of res adjudicata doctrine, (R 264/272 B) having been involved in the case of N. A. Turner as Trustee vs. Board of Public Instruction for Broward County, Florida 75 Fed. (2nd) 147. The remaining coupons in the amount of $7,440.00 were allowed as a valid indebtedness affected by the Plan of Composition, but the Master found (R 241 B) and the District Court found (R 306 B) that such coupons belonged to the corporation Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr. These findings were based upon sworn testimony and documentary evidence produced before the Master at the first hearing. The attorney of record for Albert Roberts, Jr. was present at such hearing, (R 235 B) heard evidence being introduced challenging the validity of the claim, and cross-questioned the witnesses. At the request of the claimant, Albert Roberts, Jr. (R 175 B), the hearing was adjourned for one week to permit the claimant to present evidence and substantiate his claim. At the adjourned hearing, the claimant, Albert Roberts, Jr., was not present, although his counsel was present (R 175 B). No effort was made to prove the validity of his claim or rebut the evidence offered to the effect that the coupons involved in his claim belonged to the corporation, Ed. C. Wright & Company (R 121 B, 151 B, 156 B, 276 B, 277 B). His objections to the allowance of the claim in the name of the corporation (R 303 B) were urged before the District Court and denied (R 306 B), and before the Circuit Court of Appeals and denied (R 426 B), and now petitioner renews the objection here.

NOTE: The complete record is comprised of two sections, Nos. 9381 and 9596. In referring herein to the records, the proceedings under No. 9381 will be designated "A" (thus 15-A) and those under No. 9596 as "B" (thus R 15-B). (All emphasis ours, except where otherwise designated.)

The Respondent does not believe that the Petitioner has brought his case within any of the grounds usually considered by the Supreme Court, under sub-section 5 of Rule 38, and that for such reason, the certiorari should be denied.

The claimant's first appeal (Roberts vs. Board of Public Instruction 112 Fed. (2nd) 459) involved a constitutional question, and from that decision an appeal could have been taken to this Court, but the claimant failed and refused to do so. The Petitioned is therefore concluded from raising here, by this proceeding, the question of the right or authority of the Respondent to proceed with the Plan of Composition in this proceeding.

ARGUMENT

POINT 1.

THE PROCEDURE FOLLOWED IN THE LOWER COURT AND SANCTIONED BY THE CIRCUIT COURT OF APPEALS WAS SUCH A DEPARTURE FROM THE USUAL AND ACCEPTED CUSTOM OF JUDICIAL PROCEDURE AS TO DENY THE PETITIONER HIS PROPERTY WITHOUT DUE PROCESS OF LAW.

The Petitioner's argument with reference to Point 1 (Page 15 of Petitioner's Brief) is predicated upon the theory that he comes into

Court with clean hands and a presumptively bona fide claim; and because the Master rejected the claim (R. 239-B) of the Petitioner, based upon objections of the taxing division and evidence produced at the hearing, he now insists that he has been deprived of his property without due process of law, contrary to the Fifth amendment to the Constitution of the United States.

The contentions of the Petitioner that he has been deprived of due process of law; that he comes into Court with clean hands; that the Plan of Composition discriminates against him, have been consistently ruled unfounded. The Master, appointed by the United States District Court for the Southern District of Florida after hearing uncontroverted evidence on the question of bona fides of the claim of Petitioner, held against the Petitioner (R 239-B to R. 242-B). The finding of the Master, as aforesaid, was confirmed by order of the Judge of the United States District Court for the Southern District of Florida (R. 306-B). The order of the United States District Court for the Southern District of Florida, approving the Plan of Composition of Debts and overruling the contentions of the Petitioner, as aforesaid, was appealed to the United States Circuit Court of Appeals for the Fifth Circuit, where the matter came on to be heard upon appeal before said Court, upon the contentions of the Petitioner that he should not be compelled to show the bona fides of the acquisition of his claim and the Circuit Court of Appeals for the Fifth Circuit, in ruling upon the contentions of the Petitioner, stated (R. 427-B):

> "We cannot at all agree with appellant. We think it quite plain that this record admits of no other conclusion than that appellant's position of ownership of the coupons,

whether real or colorable, and for the purpose of this proceeding it is unnecessary to determine which it is, was created in the interest of Wright & Company after the filing of the plan and exists for only one purpose, as a device to raise an apparent equity in his favor in contemplation of which the whole plan would be held invalid as discriminatory and unfair. We think this is true because appearing as he does, in an anomalous position, at first and until the plan was filed, in opposition to it as an officer of Wright & Company, the owner of both bonds and coupons, and after the plan is filed, in his own behalf as owner of coupons clipped from those very bonds, he has the burden of explaining the inconsistencies, and of establishing the integrity and consequent equities of his position.

"This burden appellant has wholly failed to sustain. Indeed, by not appearing to give testimony he has refrained from attempting to sustain it. In addition, appellee has, by the proof it made, assumed and carried the burden of establishing that appellant's ownership, as found by the Master, is either colorable or if real, was acquired after the filing of the plan; and that his predicament is the result of his own contriving under circumstances depriving it of equitable appeal, and making it quite clear that the principles and cases appellant relies on are without application here."

Albert Roberts, Jr., *versus* Board of Public Instruction for the County of Broward, State of Florida, 117 Federal (2nd) 943.

The real owner of the coupons involved in the claim is Ed. C. Wright & Company, a corporation of Florida, instead of Albert Roberts, Jr., who is the Vice-President of the corporation. During all the time when the Board of Public Instruction was attempting to work out a Plan of Composition with Ed. C. Wright & Company, and the Vice-President, Albert Roberts, Jr., no mention was made of the coupons which the Petitioner, Albert Roberts, Jr., was supposed to own, but on each occasion, the discussion centered around the matter of the fifteen bonds which could not be refunded (R. 150-B) on account of the decision in the Turner case.

Ed. C. Wright & Company, a corporation of Florida, is a bond concern, dealing in municipal bonds in the State of Florida. In some way it had purchased thirteen of the fifteen bonds of the issue of October 1, 1927, which had been in litigation in the case of N. A. Turner, as Trustee, vs. Board of Public Instruction for the County of Broward, State of Florida, tried in the District Court of the United States, for the Southern District of Florida, and verdict and judgment affirmed in 75 Fed. (2nd) 147 (R. 260-B).

After discovering that the corporation had purchased bonds which were involved in this litigation, Ed. C. Wright & Company, through Albert Roberts, Jr., its Vice-President, opened up negotiations relative to refunding this indebtedness. When the Petitioner was advised that it was impossible to refund these bonds, he then resorted to the strategy of creating an artificial issue as to ownership of coupons, in order to defeat the Plan of Refunding.

Thus it can be seen that, under the circumstances, Petitioner's insistence that he is the owner of said coupons and that he is discriminated against by the Plan of Composition of Debts, does not

stand the test universally recognized in the Courts of the United States that one claiming equity must come into Court with clean hands.

The Respondent respectfully insists that the contention of the Petitioner that the Plan of Composition of Debts denies the Petitioner his property, without due process of law, depends upon the showing of whether or not the Petitioner is the owner of the coupons involved in the claim. In this regard it is pertinent to ask, if Ed. C. Wright & Company, a corporation, owns the coupons, and not the Petitioner, Albert Roberts, Jr., wherein is the Plan unfair? The Plan provides that each bond owner shall surrender his bonds and coupons and receive new refunding bonds in exchange. All creditors are treated alike. The only creditors who testified upon hearing said that the Plan is fair and to the best interests of the creditors. (R 167/169 B). The Petitioner, Albert Roberts, Jr., offered no testimony upon hearing to support his contentions that the Plan is unfair. Therefore, how can it be said that the Plan is unfair to Petitioner when he has not proved the ownership of any securities affected by the Plan, has introduced no evidence as to the unfairness of the Plan, and when the Plan has been approved by the Master and affirmed by the Court.

The Respondent respectfully contends that the Petitioner has been given every opportunity to present any bona fide claim that he might have; that the objection raised in this litigation by the Petitioner is an effort on his part to create an artificial issue to impede the consummation of the Plan of Composition of Debts evolved by the Respondent; that said efforts on the part of the Petitioner are motivated entirely by a desire to compel recognition

by the Respondent of the fifteen void bonds involved in the Turner case.

Under the circumstances it seems to the Respondent that the Master was justified in requiring a showing of bona fides on the part of the Petitioner as to the acquisition of his alleged claim. This contention of the Respondent is supported by the finding of the United States Circuit Court of Appeals for the Fifth Circuit (R. 426-B):

> "The findings show that appellant was the vice-president of Wright & Company; that Wright & Company owned a large block of bonds and particularly several which have been adjudged invalid, and before and since the plan of composition was formulated it has opposed the efforts of appellee to refund its bonded debt unless these bonds are recognized; that the coupons appellant claims and filed claim as owner of were clipped from Wright & Company bonds; that it was appellant, who as vice-president of Wright & Company, conducted the conferences on its behalf with Appellee and as late as May and June, 1939, with the refunding agent of appellee, and refused on its behalf to join the refunding plan; and that at that time he made no claim on his own account, and none that the plan would discriminate against the holders of coupons only. These findings and the record show; that of all the holders of appellee's bonds only Wright & Company filed opposition to the plan; that no person before the filing of the plan, and only appellant since its filing has claimed to own coupons only; and that throughout all of the proceedings appellant

has consistently followed the practice of joining Wright & Company in objecting to and opposing the proceedings below and of appealing by himself from rulings adverse to these objections.

> Albert Roberts, Jr., v. Board of Public Instruction for the County of Broward, State of Florida, 117 Fed. (2nd) 943.

Respondent fails to find anything unusual about the procedure followed by the Special Master in determining the validity of the claims filed, or how the Special Master could have determined otherwise upon the evidence submitted. The Petitioner was represented at both hearings before the Special Master, and never appeared to offer any testimony to support the bona fides of his claim, nor did he object to evidence seeking to disprove same. (R. 121-B).

POINT 2.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES, AS ANNOUNCED IN AMERICAN UNITED LIFE INSURANCE COMPANY VERSUS AVON PARK, 85 LAW EDITION 112; CASE VERSUS LOS ANGELES LUMBER CO., 308 U. S. 106.

The Petitioner has cited to this Court the case of American United Life Insurance Company v. Avon Park, 85 Law Edition 112, as apparent authority to justify his contention that the Plan of Composition of Debts is unfair. The Plan of Composition, as amended, did not warrant the criticism directed at the Plan involved

in the case of American United Life Insurance Co. vs. Avon Park, 85 L. Ed. 112 or in Case vs. Los Angeles Lumber Co., 308 U. S. 106. The Petitioner herein does not occupy the position of a bona fide creditor seeking to upset a Plan injurious to him as such bona fide creditor. Indeed, the bona fides of the claim of this Petitioning creditor have been consistently challenged and consistently ruled against, so that he does not even occupy the position of a creditor under the provision of the Bankruptcy Act.

The Petitioner's insistence that the Avon Park case (supra) is authority for his challenging the instant "fiscal agent" contract is not well founded. There is a vast difference in the "fiscal agent" contract of the City of Avon Park and R. E. Crummer & Company in that case, and the Plan of Composition of the Respondent in this case. Under the Crummer contract, the City was not obligated to pay any of the costs of the refunding, for such contract provided that Crummer should defray costs incident to assembling the bonds, print the refunding bonds, obtain a legal opinion approving the bonds, etc. In addition, R. E. Crummer and Company *was a bond owner* owning certain bonds to be affected by the Plan of Composition, and thus obtained an undisclosed profit on those bonds, without making a full disclosure of all compensation accruing to it under the Plan. The Supreme Court of the United States, in passing upon such contract, held:

> "4. In proceeding for confirmation of plan for composition of debts of city, where, without vote of city's fiscal agent, which was also a creditor, acceptance by requisite two-thirds of creditors would not have been obtained, the fiscal agent was under obligation of making full and com-

plete disclosure of all its interests, and the burden was on the fiscal agent of showing at least that such disclosure had been made. Bankr. Act Par. 81 et seq. as amended, 11 U. S. C. A. Par. 401 et seq."

"13. Where city seeking confirmation of plan for composition of city's debts was represented by fiscal agent which had acquired bonds at default prices, allowance of compensation to the fiscal agent without scrutiny of the agent's speculation in securities of the city was improper. Bankr. Act. Par 81 et seq., as amended, 11 U. S. C. A. Par. 401 et seq."

"15. The provision in statute, regarding composition of indebtedness of local taxing agencies, authorizing allowance of reasonable compensation for 'services rendered' necessarily implies loyal and disinterest service in the interest of the persons for whom claimant purported to act. Bankr. Act. Sec. 83, sub. b, 11 U. S. C. A., Par. 403, sub. b."

American United Mutual Life Insurance Company v. City of Avon Park, Fla. 61 Sup. Crt. Rep. 157, 85 L. Ed. 112.

The Supreme Court of the United States held that such contract must be set aside because the fiscal agent had not disclosed to the bondowners and to the Court its full compensation in the cause. *No such showing is made in the instant case.* No charge is made that the Refunding Agent failed to disclose all compensation accruing to him. There is no evidence that the Refunding Agent owns any bonds whereby he could have made a speculative profit as a result of the Plan of Composition, and his total compensation

was disclosed and approved by the District Court. All fees and expenses were reported and approved by the District Court as reasonable; the Refunding Agent was not acting in a dual capacity, and did not obtain an undisclosed benefit from the Plan.

Respondent does not insist that this plan is fair because 74% of the creditors have agreed to same; but Respondent does insist that the fact that 74% of the creditors had agreed to the plan at the time of entry of the Order of Confirmation, and that since such time additional creditors have agreed to the plan and exchanged their bonds, bringing the total exchanged to 87%, coupled with the fact that every creditor, who testified at the hearing, testified as to the fairness of the plan, left no alternative for the Master and the Lower Court, but to find the plan fair.

POINT 3.

THE LOWER COURT AND THE CIRCUIT COURT OF APPEALS FAILED TO FOLLOW THE DECISIONS OF THE SUPREME COURT OF THE STATE OF FLORIDA IN DETERMINING THAT THE BOARD OF PUBLIC INSTRUCTION WAS "AUTHORIZED BY LAW," AS REQUIRED BY THE ACT (11 U. S. C. A. 403 (e)) TO CARRY OUT THE PROVISIONS OF THE PLAN OF COMPOSITION.

The Petitioner's major premise, argued under Point 3, is that under the laws of the State of Florida, the Plan of Composition of Debts, evolved by the Respondent, is illegal.

As concerns the law of the State of Florida, it appears to the Respondent that there is no more convincing answer to Petitioner's contentions in this regard than to cite to this Court the Florida Supreme Court decisions, specifically approving the

particular Refunding Bonds issued pursuant to said plan, to-wit:

Bryan v. Board of Public Instruction for Broward County, 195 So. 697, 142 Fla. 691.
Bryan v. Board of Public Instruction for Broward County, 195 So. 698, 142 Fla. 693.
Bryan v. Board of Public Instruction for Broward County (1), 195 So. 699, 142 Fla. 695.
Bryan v. Board of Public Instruction for Broward County (2), 195 So. 699, 142 Fla. 696.

The Petitioner has cited the cases of Taylor v. Williams, 195 So. 175, 142 Fla. 402; Taylor v. Williams, 196 So. 215, 142 Fla. 756; W. J. Howey Co. v. Williams, 195 So. 181, 142 Fla. 415; Motes v. Putnam County, 196 So. 465, 143 Fla. 134; State v. City of Fort Myers, 198 So. 814, to support his contention that the Plan of Composition is illegal and void. Those cases present no similarity in factual background with the facts in the instant case. In each of those cases the fiscal agent, named therein, agreed to defray all expenses incident to assembling and exchanging the bonds, printing of the refunding bonds, representing the taxing divisions, validating said bonds, and obtaining the approving opinion of nationally recognized bond counsel upon the procedure used for the issuance and validation of said refunding bonds, said counsel to be selected by the said fiscal agent. In the instant case the Board of Public Instruction for the County of Broward, State of Florida, performed all of its duties in the validation and execution of the refunding bonds, retained Attorneys to file validation proceedings, retained Attorneys to write the approving opinion, and retained Attorneys to file the Bankruptcy proceedings.

The duties of the Refunding Agent in this case consisted in getting creditors to consent to the Plan of Composition of Debts, as modified by the Bankruptcy Act. In order to do so, it was necessary for him to employ assistants to help him in securing such consents. However, obtaining consents to the Plan of Composition of Debts is not an official act which necessarily must be performed by the Board of Public Instruction. The official acts, required to be performed by the Board of Public Instruction, are the adoption of a Plan of Composition, the employing of Attorneys to file and prosecute the bankruptcy proceedings, the authorization, validation and execution of the refunding bonds, and the payment of such expenses in connection with the Plan as are approved by the Bankruptcy Court.

It is, therefore, apparent that the instant "fiscal agency" contract does not run afoul of the ruling of the Florida Supreme Court in the Taylor v. Williams cases, because the plan does not contemplate nor provide that the Refunding Agent shall perform any other than ministerial duties.

As for the case of State v. City of Fort Myers, supra, Respondent respectfully quotes from the Court's findings, as follows:

> "In this case there has been no abdication of the power or authority of the City Commission; nor has there been any delegation of the power or discretion of the City Commission to the fiscal agents. That the administrative officers charged with duties of the sort involved here may pay reasonable fees for the services of fiscal agents to assist them in accomplishing the desired result has been

upheld by us in Pierce v. Isaac, 134 Fla. 666, 184 So. 509; City of Miami v. State, 139 Fla. 598, 190 So. 774."

"The record in the instant case shows that the operation of the refunding program, if and when the same is carried out according to its tenor and effect, will result in a saving to the City of something more than One-half Million dollars."

State v. City of Fort Myers, 198 So. 814.

The Petitioner continually refers to the Refunding Plan adopted May 2, 1939. That was a voluntary plan. When it was made a Plan of Composition in bankruptcy proceedings, it was amended to conform to the bankruptcy law, and provided that all procedural steps should be taken by the taxing division, and all fees and expenses approved by the Court. The creditors all consented to the Plan of Composition, as amended. The record (R. 6A, 18A, 37A, 45A, 106B, 114B, 116B, 273B, 117 B, 275B, 118B, to 121B, 276B, 125B, 131B, 135B, 136B, 138B to 140B) clearly shows that the procedure followed did not come within the criticism of the cases cited by Petitioner.

That the Refunding Plan adopted May 2, 1939 (R. 273 to 274B) was not the same as the Plan of Composition, as amended, and approved by the Court, clearly appears from the evidence, inasmuch as the Refunding Plan provided for an allowance of $35,362.92 as Refunding fees, while under the Plan of Composition, as amended, the fees allowed for the Refunding Agent, and approved by the Court, amounted to only $11,000 (R. 401B).

In a direct proceeding, the Supreme Court of Florida held

that, under this Plan of Composition, the particular fees to be allowed could legally be paid from the fund set up, as follows:

> "The pronouncement as to the validity is subject to the express provision that the payment of principal and interest of said bonds is limited to the definite portion of the special tax of not exceeding ten mills authorized to be levied under Section 8 of Article 12 of the Constitution of Florida, and the use of any other portion of the *general school fund* of Broward County for the purpose of payment of principal and interest on the refunding bonds, including refunding expenses, is not authorized, unless approved by a vote of the people * * * "
>
> Bryan v. Board of Public Instruction for Broward County, 142 Fla. 691, 195 So. 697.

The Supreme Court of Florida is thus saying that it approves the payment of principal, interest and refunding expenses on the new refunding bonds from the proceeds of the 10 mill tax levied against ad valorem valuations, both exempted and non-exempted, as provided in the Plan of Composition; but it does not approve the payment of such principal, interest and refunding expenses from funds in the General School Fund of Broward County, not realized as proceeds from such levy. The Plan of Composition does not contemplate using such State funds, forwarded by the State of Florida to Broward County, Board of Public Instruction for school operation funds, to pay principal, interest and refunding expense.

The contention of the Petitioner, therefore, that principal and interest of the refunding bonds, as well as refunding expenses, cannot be paid from the "B. P. I. Bond Fund" and the "B. P. I.

Homestead Levy Fund" is without merit, as our Supreme Court has ruled directly upon such point. The cases cited by the Petitioner are not in point, and therefore, can have no bearing upon this particular issue of bonds, inasmuch as the Supreme Court of Florida has ruled directly that these bonds are legally and lawfully issued, and are payable from the particular funds set out in the Plan of Composition.

The Barrett vs. Moffett case, 95 Fla. 111, 116 So. 71, quoted by the Petitioner in his brief, has heretofore been reversed by the Supreme Court of Florida, as well as by the Circuit Court of Appeals. This Barrett vs. Moffett case, supra, was argued by Appellant in each of the Bryan cases, supra, and the Supreme Court of Florida held that such case was overruled by the case of State vs. Board of Public Instruction of Dade County, 126 Fla. 142, 170 So. 602, and by State vs. Board of Public Instruction for Manatee County, 139 Fla. 519, 190 So. 686. The Circuit Court of Appeals overruled the Barrett vs. Moffett case in the case of Board of Public Instruction for Polk County, Fla. vs. Gillespie, 81 Fed. Rep. (2nd) 586.

In quoting from the case of Bryan vs. Board of Public Instruction for Broward County, Florida, 195 So. 697, Petitioner set out the portion of the decision which prohibited the use of certain funds for payment of principal and interest and refunding fees, but did not set out the portion of such decision, which authorized the use of the Special tax levied under the provisions of Section 8 of Article 12 of the Constitution for such purpose.

The Petitioner has contended that the "B. P. I. Homestead Levy Fund" is an illegal fund and not authorized in view of

Section 7 of Article Ten of the Constitution, known as the Homestead Amendment. There was a time when we Attorneys were mildly excited over the possibility of securing a holding that homestead property was exempt from bond indebtedness as well as operating expenses, but all of the Courts have now spoken on such subject and the matter is at rest. The cases are numerous, and no useful purpose can be served by citing them. The holding of the many decisions is to the effect that refunding bonds, issued to refund outstanding bonds, carry the same lien against homesteads as did the original bonds. The "B. P. I. Homestead Levy Fund" in Broward County, Florida, was created in accordance with the peremptory writ, issued by the District Court of the United States for the Southern District of Florida, in the case of United States of America, ex rel., George Kiess, Relator, vs. The Board of Public Instruction for the County of Broward, State of Florida, a body corporate, et al., Respondents.

If, as the Appellant argues, the procedure set out for payment of the refunding bonds and expenses of refunding is illegal, and can be enjoined, then the issuance of refunding bonds, as contemplated, would not have been authorized by the Lower Court and the Supreme Court of Florida, in the Bryan cases, supra.

The question of authority of the Board of Public Instruction of Broward County, Florida, to file proceedings in bankruptcy under the provisions of the Bankruptcy Act, was decided in the first appeal, Roberts vs. Board of Public Instruction, 112 Fed. (2nd) 459, wherein the Court held:

> "3. In determining the scope of the sections of the Municipal Bankruptcy Act and whether a particular peti-

tioner comes under them, the question whether the petitioner is a political subdivision of a state is unimportant, since without distinction on that ground all of the districts and municipalities named in the act as authorized to apply for composition are entitled to do so."

"4. Even if a political subdivision of a state could not invoke the Municipal Bankruptcy Act, a party objecting to a proceeding for composition of debts by a Florida county board of public instruction created and organized to instruct, maintain, and operate public schools or public school facilities could not avail of that position in view of Florida constitutional provision that the state shall be divided into political divisions to be called counties, since board, though it is an 'agency of the state,' is not a 'county'."

and no appeal having been taken from that decision, the decision of the Circuit Court of Appeals stands. The authority of a Board of Public instruction to avail itself of the provisions of the Bankruptcy Act had previously been upheld in the case of Getz vs. City of Edinburgh Consolidated Independent School District, 101 Fed. (2nd) 734.

POINT 4.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IN SUSTAINING THE OBJECTION BY THE BOARD TO PART OF PETITIONER'S CLAIM IS CONTRARY TO THE DECISION OF THE SUPREME COURT OF FLORIDA.

The doctrine of res adjudicata prevented the Special Master from allowing coupons totalling $5,070.00 from being proven as a debt of the taxing division. These coupons had been involved in an action for money had and received in the lower Court, and a ver-

dict for the defendant in such Court had been affirmed by the Circuit Court of Appeals in the case of N. A. Turner, as Trustee vs. Board of Public Instruction for the County of Broward, 75 Fed. (2nd) 147. At the Special Master's hearing, the taxing division objected to Petitioner's claim, and introduced in evidence certified copies of the verdict and judgment in the lower Court. (R. 84/87 B). The Petitioner objected because all of the file was not introduced in evidence. The Special Master felt that the verdict, final judgment, petition to remove exhibits, Order Allowing Withdrawal of Exhibits, receipt for exhibits, and mandate would be sufficient (R 86-B), but upon the insistance of the petitioner, permitted him to introduce in evidence such other parts of the record of such case as he desired, and Petitioner did introduce other parts of the record of such case (R 102 B).

The record (R 63 B & 267 B) shows conclusively that the coupons involved in Petitioner's claim were the same as the coupons introduced in evidence in the Turner case, and withdrawn from the file after the mandate from the Circuit Court of Appeals in that case had been filed. Petitioner here is an assignee of N. A. Turner, Trustee, and Petitioner's contention that he is not in privity with the Plaintiff in the Turner case is not well founded.

In addition, Bonds Nos. 66 to 78 inclusive, which were introduced in the Turner case, and to which Petitioner's coupons until recently were attached, were identified on the face thereof, as having been introduced in the Turner case, and withdrawn by permission of the Court, and the receipt of the attorney of record taken for same (R 269 B). Therefore, in addition to being constructively charged with notice of the Turner suit, the Petitioner was actually put on notice of the holding, verdict and judgment in that case.

The Respondent takes the position that it is powerless to refund the fifteen bonds which were involved in the N. A. Turner litigation. In that litigation, N. A. Turner, as Trustee, filed his civil action in the District Court of the United States for the Southern District of Florida, to recover a judgment for money had and received on fifteen bonds of the issue of October 1, 1927, described in Petitioner's Exhibit No. 2 (R. 260-B). This suit was filed shortly after the decision in Barrett v. Moffett, supra, under the theory that, if the bonds were not valid obligations, then the debt evidenced by the bonds was a valid obligation, and a judgment could be recovered on the debt. At the time of filing suit, the bonds had not matured, but certain of the coupons from said bonds set out in Petitioner's claim had matured. In disposing of the case, the Judge charged the jury that it should return a verdict for the Defendant (R. 280-B), and, after the verdict was returned for the Defendent (R. 265-B), the Judge entered a judgment for the Defendant (R. 265-B). The Plaintiff in said case took an appeal to the Circuit Court of Appeals, which resulted in the Circuit Court of Appeals approving the verdict of the jury and the judgment of the Court. (See Turner, as Trustee, Appellant, versus Board of Public Instruction for the County of Broward, State of Florida, Appellee, 75 Fed. (2nd) 147 (R. 270-B).)

The Board of Public Instruction construed such judgment and affirmance by the Circuit Court of Appeals to mean that, on a question of fact, the Jury had determined that the holder of such obligations should not recover against the Board of Public Instruction for Broward County, Florida. The State School Auditor so ruled, and the said bonds were removed from the records of obligations which the Board should pay (R. 101-B). As no further pro-

ceedings were taken in the case, the matter became res adjudicata. If the Board of Public Instruction had included these bonds as obligations to be refunded in the Plan of Composition of Debts, the plan would have been illegal. There was no alternative in the matter, and the Board necessarily had to exclude these obligations from the Plan of Composition.

The Petitioner is now arguing that the Turner case is not res adjudicata; that the action sought to recover on a debt and not upon the bonds; the Board has waived its plea of res adjudicata. We cannot follow the argument of the Petitioner. At its first opportunity, the Board interposed objections to the allowance of a claim including such obligations (R. 58-A to 60-A). The Special Master did not feel that he was authorized to go behind the judgment of the Appellate Court, and the Lower Court found that it could not go behind the judgment of that Court.

We regret that the creditor has purchased bonds involved in this litigation, but he is charged with knowledge of the records, and the records clearly show that a jury had made findings upon the subject matter, the Court had entered judgment, and same had been affirmed by Appellate Court. The Order allowing withdrawal of exhibits (R. 268-B), and the receipt for such bonds (R. 269-B) were public records at the time that Petitioner's corporation purchased the bonds, and Petitioner's corporation, as well as Petitioner, is charged with the notice of the record.

Petitioner is asking this Court to reverse the decision in the case of N. A. Turner v. the Board of Public Instruction for the County of Broward, 75 Fed. (2nd) 147. Respondent contends

that the matter is res adjudicata, and the Petitioner's request comes too late.

CONCLUSION

No suffcient showing has been made to entitle the Petitioner to a Writ of Certiorari. There is no showing that the Circuit Court of Apppeals of the Fifth Circuit has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter; or that it has decided an important question of local law in a way probably in conflict with applicable local decisions; or that it has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or that it has decided an important question of federal law which has not been, but should be, settled by this Court; or that it has decided a federal question in a way probably in conflict with applicable decisions of this Court; or that it has so far sanctioned such a departure by a lower Court, as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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In the Supreme Court of the United States

No. 972

ALBERT ROBERTS, JR.,

Petitioner,

versus

BOARD OF PUBLIC INSTRUCTION FOR THE COUNTY OF BROWARD, STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

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(emphasis added, except where otherwise noted)

Point I.

The Respondent in many instances in its statement of the case and all through its brief in opposition to the petition for Writ of Certiorari, has apparently so misconceived the actual facts in the case that the Petitioner can not, by remaining silent, leave any implication that such statements are in any manner the true facts in the case. For instance, on page 2 of the brief the Respondent makes this statement of facts:

> "The Board of Public Instruction objected to claims Numbered 52 and 54, filed by the corpora-

> tion and its Vice-President, upon the grounds that both claims involved bonds and coupons which could not be refunded under the Plan of Composition (R 58/60-A) and further objected to the allowance of claim No. 54, in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Company, and not to the Vice-President, Albert Roberts, Jr., and the taxing division submitted positive proof to this effect, and proved to the satisfaction of the Special Master (R 235/241 B) and the Court (R 306 B and R 394 B) that the Vice-President had split the claims in order to create an artificial and technical issue."

Our construction of the record does not bear this out. An objection was made to *part* of claim No. 54 on the grounds that some of the bonds were claimed to be illegal by the taxing unit. As a matter of fact, the complete written objection to that claim appears on page 58 of the record—(58-A). That objection, insofar as it refers to the particular coupons, reads as follows:

> "The Board of Public Instruction for the County of Broward, State of Florida, Petitioner in these proceedings, hereby files objections to allowance of the claim filed by Albert Roberts, Jr., on Aug. 14, 1939, *in so far as same applies to coupons detached from Bonds Nos. 66 to 78 inclusive* of the issue of 10/1/27, and interest thereon upon the following grounds, to-wit:" (emphasis added) (R 58-A)

But Respondent is entirely mistaken when he states on page 3 of his brief that it

> "Further objected to the allowance of claim No.

54 in the name of Albert Roberts, Jr., inasmuch as such coupons actually belonged to the corporation, Ed. C. Wright & Co., and not to the Vice-President."

We submit that no such objection was ever made. The only objection ever interposed by the Petitioner was the objection appearing on page 58 of the first record (R 58-A) and quoted above. Moreover, on the first day of the proceeding the claims were again scrutinized by the attorney for the Board and no objection on this point was interposed at that time. Thus, on page 95-B, the following colloqui appears:

"Mr. Ross:

Taking up those claims from the back order there, I would like to move that we go along, which is our right, under the bankruptcy law, if the petitioner does not object to the allowance of claims they are automatically allowed at the hearing, that is in the bankruptcy law. I would like to call those claims out by number and move for allowance and disallowance, and you can note on the side what is done of each one of those claims in the order named.

"Mr. Warren:

Isn't that unnecessary? If you are not going to object to them you admit them, don't you?

"Mr. Ross:

Alright then, I will pick out the ones I object to.

"The Master:

They can then be admitted except those you object to, and you can take those up separately."

Thereupon, each of the claims was taken up and examined by the Board, and when the attorney came to

the claim of Albert Roberts, Jr., in the sum of $12,510.00, the Petitioner herein, this objection was interposed (P. 98-B):

> "Now, as to claim No. 54 filed by Albert Roberts, Jr., I suggest that same be disallowed *as to $5,070.00 of coupons of the 10-1-27 issue*, which are coupons detached from the same bonds which are involved in the Turner suit." (emphasis added)

Roberts' claim was for the total sum of $12,510.00 (R 62-63-B), the only part of that total amount objected to was the sum of $5,070.00 as stated above. The other part of the claim in the sum of $7,440.00 was specifically allowed by the master and the court concurred in the allowance (R 394-B). The board never objected to the claim of Roberts on the ground that the coupons were owned by Ed. C. Wright & Co. It is true that, after the claim was allowed, the board produced the testimony showing Roberts' appearance before it in 1938 in connection with a plan of refunding, and showed Roberts' conversations with the fiscal agent prior to the proceedings in bankruptcy, but even during this testimony the board never asked that Roberts' claim be re-examined or re-opened, and to the very end of the case the claim stood as an allowed claim. Thus, under the usual and accepted procedure of bankruptcy, the board should have asked that the Roberts claim be reconsidered and rejected. The Bankruptcy Act is specific on this point. It states, Section 57 (k):

> "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

The testimony relating to Roberts' particular meeting with the Board in 1938 is herein outlined:

"Q. Can you name some of your creditors represented by claims filed here who have appeared before your School Board?

A. Well, I remember that one time Dick Lyman was here and discussed this matter. He is connected I believe with Broward County Bond Owners' Association, and at one time there was a special meeting of the Board called for the purpose of discussing this matter with Mr. Roberts I think, representing Ed. Wright and Company in St. Petersburg.

Q. Is that the same Mr. Albert Roberts, Jr., who has filed proof of claim No. 54?

A. Albert Roberts, Jr.

Q. And your Board discussed with Mr. Roberts a plan of composition of this debt?

A. In a special meeting of the Board called for that purpose.

Q. Do you have the minutes and records of that meeting?

A. Yes, I think they are here. It was on *April 20, 1938*. It followed some correspondence with Mr. Roberts.

Q. Could you have prepared a copy of those minutes to be substituted here in the record relative to Mr. Roberts' appearing before your board?

A. Yes.

Mr. Ross:

Then I would like to tender that portion of the minutes of April 20, *1938* shown on Page No. 2159

of Minute Book 8 with leave to substitute certified copy of that portion.

Mr. Warren:

No objection.

The Master:

Received and filed in evidence with leave to substitute copy as Petitioner's Exhibit 8.

(Said original was admitted in evidence and withdrawn and copy of excerpt was marked Petitioner's Exhibit No. 8).

Mr. Ross:

Q. In what capacity did Mr. Roberts appear there, who was he representing?

A. Vice President of the Ed. C. Wright Co., of St. Petersburg.

Q. That is the same Ed. C. Wright & Co., which has filed proofs of claim Nos. 52 and 53, is that right?

A. As far as I know.

Q. Did he talk in relation to any particular bonds at that particular time?

A. No, not that I remember. He said they held some bonds over there that they would like to get settled some way.

Q. Did he make any particular reference at that time to the suit of R. E. George?

A. No, I don't remember that he did.

Q. He never made any reference to that suit?

A. No.

Q. But you state that he did discuss with you this matter of trying to work out this indebtedness?

A. Yes, the minutes show that there was a special meeting held at his suggestion for that purpose."

The court will, of course, bear in mind that this meeting was had in 1938, long prior to any proceeding in bankruptcy. Without attempting to quote all the testimony relating to the Petitioner, it is completely set out on page 146 to 157—R 146/157-B. None of it denied the ownership in Roberts of his coupons which had been allowed. Even the fiscal agent testified as follows (R 156-B):

"Q. I believe you stated you had talked to Albert Roberts and at the time you talked to him he was speaking as the representative of Ed. C. Wright & Co.

A. He was speaking as the representative of Ed. C. Wright & Co., *and I don't know what other capacity he was speaking in.*

Q. He didn't at that time indicate that he owned any of the coupons or any of the bonds to be affected by the plan?

A. I will state again I couldn't give his exact words, but I most certainly understood that he could only speak as a member of the firm of Ed. C. Wright & Co. and had to go to his superior officer, Mr. Wright, before he could give any answer.

Q. And at the time you were talking to him, was that after this plan had been adopted, the plan was adopted May 2d?

A. Yes, after the plan had been adopted.

Q. And at the time you were talking to him it was after this George suit was filed on May 11, 1938, a year ago?

A. Yes.

The Master:

Were the coupons covered by the Roberts proof of claim included in the George suit?

Witness:

A. Yes.

Q. Suit was instituted in the Circuit Court here for a judgment upon default of coupons and bonds?

A. Yes.

Q. And those coupons —

A. — Mandamus —

Q. Mandamus, — And those coupons were included in the George suit?

A. Yes.

Q. Upon which Roberts has filed a proof of claim?

A. Yes.

Q. Who is George?

A. I don't know, but in discussing *with Roberts, he acknowledged that those were his bonds that were filed in the George case, that he owned or controlled them."* (emphasis added)

It will be observed that this bankruptcy proceeding was filed on June 16, 1939. The proof of claim of the Petitioner is directly in his own name. It was never signed as Vice-President of Ed. C. Wright & Co. To presume that the coupons belong to Ed. C. Wright & Co. in the face of the Petitioner's uncontradicted and

uncontroverted sworn proof of claim, to which no objection had been interposed and which claim had been specifically allowed by the master—regardless of the former connections of Albert Roberts, Jr. with the company, particularly when the finding came after the case was closed, certainly denied Albert Roberts, Jr. his property without due process of law. As a matter of fact, he was President of his own company, Roberts & Co. at that time and was not an officer of Ed. C. Wright & Co. There was no occasion for him to take the stand and show to the court that he was no longer connected with Ed. C. Wright & Co.; that he was in competition with Ed. C. Wright & Co. at the time of the institution of the proceeding; that he paid value for the coupons. All of those matters were entirely unnecessary. The master had allowed the claim, and under the ordinary concepts of bankruptcy proceedings the Petitioner's connection with Ed. C. Wright & Co. was immaterial and irrelevant, and there was no occasion for him to take the stand and rebut an issue which the master had previously determined as immaterial. We recognize, however, that if the master had called upon Albert Roberts, Jr. during the proceedings on a reconsideration of his claim to establish the bona fides of his claim or else it would be disallowed, the situation might be entirely different, but to let him rest upon the allowance of his claim until after the case was over, during the whole time of which time his claim stood in part as an allowed claim, and then to condemn him (after the case is closed) for not putting on testimony to establish the bona fides of its acquisition certainly deprived him of his property without an opportunity of being heard.

We do not find the facts in the case to justify the statement made on page 4 of the Respondent's brief as follows:

> "At the request of the claimant, Albert Roberts, Jr. (R 175 B), the hearing was adjourned for one week to permit the claimant to present evidence and substantiate his claim."

Of course, there was no occasion for Albert Roberts, Jr. to ask for an adjournment for a week to establish his claim. It had been allowed (except as to the $5,-070.00 item) and it had not been objected to. The Respondent is mistaken when it states that the continuance was asked for the purpose of establishing his claim. The record does not so show. The record reads as follows (R 175-B):

> "Mr. Warren:
>
> If the Court please, I don't know just how much I will want to put in and it may come about that there will be very little, but I would like to have an adjourned meeting, and I will let the Court know within a week or ten days, as to what we will want to do.
>
> The Master:
>
> There will be an adjournment until 10 A.M. November 24th, to be held in the BPI office."

Point II.

The Petitioner again contends that the American United Life Ins. Co. v. City of Avon Park, Fla., 61 Sup. Ct. Rep. 57, 85 L.ed. 112, is clearly on point.

The plan was on its face that holders of interest coupons would be discriminated against. It would have been a very simple matter for the master to recommend that the plan be modified so that all creditors take a straight percentage cut in their securities, regardless of how evidenced, and thus every creditor, regardless of how the claims are held, would take the same pro rata part of the assets of the taxing unit, and no one would have been discriminated against.

Point III.

The Respondent has clearly misconceived the legal effect of the decisions of the Supreme Court approving the refunding bonds issued pursuant to the plan of composition (quoted in Respondent's brief, page 15). No contention is made that the bonds are invalid; as a matter of fact, nothing was stated in the validation proceedings concerning the hidden refunding agent's fees in the funds set up for bondholders. That part of the plan was never passed upon by the Supreme Court of Florida. The bonds in the cases of Taylor v. Williams were also declared valid, but the Supreme Court held that the funds set up for those bondholders could not be used for refunding expenses as is attempted in this case. This was particularly pointed out in the case of State v. City of Ft. Myers, 198 So. 814. The Supreme Court of Florida validated the bonds, but particularly pointed out that a taxpayer might have a remedy if the refunding fees were paid from funds set up for bondholders. Obviously, this part of the plan was not and can not be passed upon by the Supreme Court of the State of Florida. The sole point raised in the validation proceedings was the validity of the bonds. We do not claim that the refunding bonds can be en-

joined, but we do claim that a homestead taxpayer can at this moment enjoin the district from levying any taxes against his property to pay the fees of the fiscal agent, which under the plan are hidden in the funds set up for the bondholders. The scheme of refunding is unique to say the least, but actually its costs are being assessed against the taxpayers in such a way as is clearly contrary to the Constitution of the State of Florida. The cost of the refunding is an *operating* expense, and it can never be hidden in the sinking fund for bondholders and then paid by the Board from that fund over a period of years.

We entirely disagree with the Respondent when it claims that the case of Barrow v. Moffett, 95 Fla. 111, 116 So. 71 has been overruled. We do not understand the law to be as claimed. For instance, in the case of State v. Board of Public Instruction for Dade County, 126 Fla. 142, 170 So. 602, the Supreme Court did not overrule Barrow v. Moffett, but distinguished the facts in the case, the court there saying:

> "The case at bar may be distinguished from the foregoing cases. Barrow v. Moffett involved the interpretation of Chapter 12844, Special Acts of 1927, and while the opinion might be clearer on that point, the Act was held invalid on the theory that it authorized the issuance of bonds for paying teacher's salaries and other current expense of the public schools that should have been contemplated and paid from the annual tax levy for county school purposes, as provided by Sections 8 and 9 of Article 12 of the Constitution."

The case of State v. Board of Public Instruction for Manatee County, 139 Fla. 519, 190 So. 686, was also a

case which distinguished Barrow v. Moffett. In that case the court pointed out:

> "Counsel for intervening taxpayers admit that the court below was correct in its ruling on all the questions raised, but the second, which was in effect that the refunding bonds were invalid because they were in violation of sections eight and nine, article twelve of the constitution of Florida. To support this contention, they rely on Barrow v. Moffett, 95 Fla. 111, 116 So. 71; Board of Public Instruction of Lafayette County v. Union School Furnishing Co., 100 Fla. 326, 129 So. 824; Leonard v. Franklin, 84 Fla. 402, 93 So. 688; and State v. Board of Public Instruction for Indian River County, 98 Fla. 1152, 125 So. 357.
>
> "The pith of their contention on this point is that the cases just cited inhibit the issue of bonds to pay past due indebtedness of boards of public instruction incurred for operating expenses. Such expenses, they contend, must be paid as they mature from the proceeds derived under section eight and nine, article twelve, Constitution of Florida.
>
> "The acts authorizing the original bonds merely state that they were to pay outstanding indebtedness of the Board of Public Instruction. The character of the indebtedness is not revealed, but against the validating decree in the first instance and the refusal of the court below to deny validation we must refuse to decree them in violation of the constitution. State v. Board of Public Instruction of Dade County, supra, appears to be a complete answer to this question."

In Board of Public Instruction v. Gillespie, 81 F (2d) 586, the Board contended that:

> "The county boards contend that chapter 13072 and 13296 under which the bonds were issued and all the proceedings taken about their issuance and the bonds themselves are invalid, because the act conflicts with, and is repugnant to, sections 8, 9, of article 12, Florida State Constitution. As authority for this position they cite and invoke Barrow v. Moffett, 95 Fla. 111, 116 So. 71, decided February 1, 1928, which in a validating proceeding as to bonds to be issued by the board of public instruction of Highlands county held this as to a precisely similar act, chapter 12844, Sp. Acts of 1927, and denied validation."

The court did not overrule the Barrow v. Moffett case, but merely stated that at the time the bonds were issued and at the time they went into the hands of innocent purchasers, the Supreme Court of Florida had not judicially declared the implied limitation on the power of the legislature as announced in the Barrow case, the court saying:

> "It will serve no useful purpose for us to attempt an analysis of the Florida decisions as they existed before the bonds were issued and as they exist now. It will suffice to say of them that in our opinion, when these bonds were issued, the Supreme Court of Florida had not discovered in the Constitution and judicially declared the implied limitation on the power of the Legislature announced in the Barrow case."

In each of the cases referred to and quoted by the Respondent, the bonds had actually been placed upon the market in the hands of bona fide purchasers, and the sole question was whether or not a judgment should be rendered against the board on the bonds, or whether

the bonds could be validated into refunding bonds. The case of Barrow v. Moffett was a proceeding for the issuance of original bonds, just as the present case is for the payment of fees incurred in these proceedings. The bonds never got in the market and in the hands of innocent purchasers. Consequently, the decision in the case, which is regarded as the clear law in the State of Florida, is directly on all fours with the contention of the Petitioner—that the plan is clearly illegal and contrary to the decisions of the State of Florida announced in Barrow v. Moffett.

Point IV.

We again reiterate that the master was clearly in error in ruling that the plea of res adjudicata was established by placing the judgment in evidence without the complete record. The Respondent has failed to answer the cases rendered in the State of Florida directly on point with the contention of the Petitioner in this case.

Conclusion

In conclusion, Petitioner respectfully submits that it is entitled to a Writ of Certiorari to review the action of the lower court; that there has been such a departure from the usual and accepted custom of judicial proceedings in the lower court as to completely deny him his property without due process of law; that under every case cited the "fiscal agency" scheme is illegal and void under the decisions of the Supreme Court of the State of Florida; that the decisions of the Supreme Court of the State of Florida are binding upon the Federal Courts in Bankruptcy in determining, on an allowance or objection to a claim, whether or not the final

judgment without the complete record is sufficient to substantiate such plea of res adjudicata.

We, therefore, respectfully submit that this court should exercise its power of supervision and correct the proceedings in this case.

Respectfully submitted,

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